

## UNITED STATES DISTRICT COURT

## DISTRICT OF MINNESOTA

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)  
Kevin Scott Karsjens, David ) Case No. 11-CV-3659 (DWF/JJK)  
Leroy Gamble, Jr., Kevin John )  
DeVillion, Peter Gerard )  
Lonergan, James Matthew Noyer, )  
Sr., James John Rud, James )  
Allen Barber, Craig Allen )  
Bolte, Dennis Richard Steiner, )  
Kaine Joseph Braun, )  
Christopher John Thuringer, )  
Kenny S. Daywitt, )  
Bradley Wayne Foster, and )  
Brian K. Hausfeld, and others )  
similarly situated, )  
)

Plaintiffs, )

vs. )

St. Paul, Minnesota

July 14, 2014

9:40 a.m.

Lucinda Jesson, Dennis Benson, )  
Kevin Moser, Tom Lundquist, )  
Nancy Johnston, Jannine )  
Hébert, and Ann Zimmerman, )  
in their individual and )  
official capacities, )  
)

Defendants. )

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BEFORE **THE HONORABLE DONOVAN W. FRANK**  
UNITED STATES DISTRICT COURT JUDGE  
BEFORE **THE HONORABLE JEFFREY J. KEYES**  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

**EVIDENTIARY HEARING - DAY ONE**

Official Court Reporter: JEANNE M. ANDERSON, RMR-RPR  
Suite 146 U.S. Courthouse  
316 North Robert Street  
St. Paul, Minnesota 55101

Proceedings recorded by mechanical stenography;  
transcript produced by computer.

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1                                    **P R O C E E D I N G S**

2                                    **IN OPEN COURT**

3                    THE HONORABLE JUDGE FRANK:    You may all be seated.  
4                    Thank you.

5                    I will first apologize for the late start.    Trying  
6                    to coordinate things with input from all parties and  
7                    including working with our own Court Security Officers,  
8                    Marshal's Service, parties.    But if someone is interested or  
9                    frustrated with that, then you should place it on my  
10                    shoulders, not anyone else's.

11                    And we tried to -- we have an overflow courtroom  
12                    in the event so we don't deny access to individuals, even  
13                    though in a perfect situation we would have more seating.  
14                    We've arranged the other courtroom as we did the last time.

15                    With that, before we kind of set the order of  
16                    events today, why don't we have introductions by respective  
17                    counsel.    We can start with Mr. Gustafson and counsel for  
18                    the Plaintiffs.

19                    MR. GUSTAFSON:    Thank you.    Good morning,  
20                    Your Honors.    Dan Gustafson from Gustafson Gluek,  
21                    Minneapolis, on behalf of the Plaintiffs in the Class.    With  
22                    me are my partners, Karla Gluek, Raina Borrelli, David  
23                    Goodwin, Sarah Moen, and then just to Sarah's left is  
24                    Mr. Terhaar, and Ms. Minor from the MSOP.    And then on the  
25                    first bench, Your Honor, Ms. Bailey and Ms. Todd-Bense.    So

1 that's our team.

2 MR. BRENNAMAN: Thank you, Your Honors. Good  
3 morning. Nathan Brennaman from the Minnesota Attorney  
4 General's Office here today on behalf of the Defendants in  
5 the Karsjens Class action, and here today also on behalf of  
6 the Commissioner as Respondent in the two habeas matters.

7 Although, I would like to note and as the Court is  
8 aware, we have made a legal element that the evidentiary  
9 hearing, at least insofar as the habeas petitions, should  
10 not happen. And my appearance today on behalf of  
11 Commissioner Jesson, as Respondent, is not intended to be a  
12 waiver of that legal argument.

13 THE HONORABLE JUDGE FRANK: We'll discuss the  
14 agenda. We filed that order on July 10th, trying to set the  
15 scope of it, and whether or not at a future time or within  
16 any -- presumably tomorrow, any oral arguments on habeas,  
17 obviously, that order says we will be receiving testimony  
18 today on the 1983 action. And obviously, that's objected to  
19 by Plaintiff, but we'll make sure that the "W" word, waiver,  
20 is not an issue for either Plaintiff or Defendant before we  
21 close the record on this hearing, whether that closure comes  
22 today or tomorrow.

23 MR. BRENNAMAN: Okay, thank you, Your Honor. I  
24 just thought I would not it. And I have here also with me  
25 today, Scott Ikeda from the Minnesota Attorney General's

1 Office, and Aaron Winter.

2 Although I'll be doing most of the heavy lifting,  
3 I think that they will be participating in helping out with  
4 the hearing. Thank you.

5 THE HONORABLE JUDGE FRANK: Mr. Gustafson, I  
6 thought you were trying to get up and head for the mike,  
7 there.

8 MR. GUSTAFSON: You saw me try to get out of my  
9 seat, there.

10 I just wanted to say that we don't have any  
11 objection to proceeding with the evidentiary hearing on the  
12 1983 case first. I think your Order makes clear that the  
13 evidence is going to be preserved in the event that a habeas  
14 evidentiary hearing is required or combined, or however we  
15 might fashion it.

16 But we think that it's most efficient now to not  
17 deal with the issues that habeas might -- that might arise  
18 separately in the habeas cases. And if we get to tomorrow  
19 or the end of the day today and we have that argument and  
20 Your Honors decide you want to hear that evidence, we're  
21 prepared to go forward.

22 But, we agree with the state that we ought to  
23 start with the 1983 evidence and see how it goes.

24 THE HONORABLE JUDGE FRANK: Why don't we kind of  
25 set the stage for today's -- the hearing's events.

1 First of all, before we call upon counsel to kind  
2 of begin with a couple of inquiries on the current status of  
3 the case with respect to -- and we'll be using names today,  
4 but with respect to E.T. and R.B. -- we'll use the names out  
5 of respect. And I don't mean disrespect by using the  
6 initials, initially.

7 One, as we touched on before and the Order  
8 clarifies from July 10th, consolidation not unique to this  
9 case means different things to different individuals. But  
10 there was never an intent by the Court to, when the cases  
11 were related and then consolidated, they were consolidated  
12 initially, like in many cases, for the limited purpose of  
13 having two judicial officers manage the case.

14 Because many cases are consolidated and that  
15 doesn't mean everything is joined in one hearing for one  
16 trial. And so we tried to set out in an order to clarify  
17 how we will proceed in fairness to both parties, and that  
18 Order was filed, as the parties know, and it was public on  
19 July 10th.

20 Secondly, I don't think there's any confusion with  
21 the parties, but sometimes people less familiar with Federal  
22 Court. They like to -- maybe the right word is speculate  
23 about, well, why is both an Article III Judge and a  
24 Magistrate Judge together up on the podium? Not all that  
25 unusual.

1           For example, for a number of you who have been in  
2           the national cases and a number have had the multidistrict  
3           litigation cases and other cases, we're doing it here  
4           similarly to that, for this reason. Whether issues come  
5           up -- and we did it for the same reason last time -- it's  
6           our goal, and that is one of the agenda items that we will  
7           discuss at the end of the hearing about expediting and  
8           moving up the final trial dates. Frankly speaking, our goal  
9           is to move them to sometime this fall, not next spring.

10           So, whether it is a discovery issue, which in our  
11           District Magistrate Judges here or because Magistrate Judge  
12           Keyes has been involved, as you know, for well over a couple  
13           of years in the case, we felt that justice required and that  
14           we could best serve all parties if we hear all issues. So,  
15           whether it's a discovery issue, it's a scheduling issue, we  
16           are prepared to act on those -- unless you have something to  
17           add to that, Judge Keyes? So, that's really -- there's no  
18           mystery to it, that is the purpose.

19           Now, we'll set the stage for today's events and  
20           perhaps tomorrow.

21           We're going to first inquire of counsel.

22           (Cell phone interruption.)

23           THE HONORABLE MAGISTRATE JUDGE KEYES: That's why  
24           I should probably not be on the Bench.

25           THE HONORABLE JUDGE FRANK: No contempt findings

1 today.

2 Now, it's interesting, since that happened, an  
3 increasing number of federal courthouses across the country  
4 and federal buildings have lockers as you come in downstairs  
5 and lock up everybody's cell phones, iPads. We try to take  
6 a more what I'll call, pro-public, pro-lawyer approach. And  
7 we haven't had it backfire, although we've had a few people  
8 call us to say, "Did you see the people taking pictures in  
9 the back of the courtroom with their iPhones?" Not to plug  
10 one brand over another.

11 We have tried to work with parties, and we're  
12 unified as a bench on this. And so, hopefully, we'll  
13 continue with that practice, but there is a trend across the  
14 country to have lockers, or in some of the rural areas tell  
15 you to go back to your car and lock them up. We've tried to  
16 avoid that and haven't had any miscarriage of justice, yet.

17 We'll be seeking an update before we begin the  
18 testimonial piece of the case on the status of the two  
19 individuals that are the focus of the hearing, an update on  
20 their living situation, a discussion with counsel, which  
21 isn't unique to this case, about if we can have an expedited  
22 process for admission of exhibits for this particular  
23 hearing.

24 Then, if counsel wish -- if respective counsel  
25 wish, as you had a communication from my chambers at the end



1 of last week, if you, one or both, want to give any  
2 introductory or opening statements; but, prior to that, the  
3 intent of the Court -- and when we reach that point, we'll  
4 give you a chance to put anything on the record. But, with  
5 or without objection, here is how we intend to proceed.

6 Since we have the four 706 experts here in the  
7 courtroom, we would intend to call, the Court to call for a  
8 narrative summary of their reports.

9 First, Dr. Robin Wilson, then Dr. Mike Miner, then  
10 after those, set the background, even though they've all  
11 four signed the 706 reports, then Dr. Naomi Freeman to  
12 discuss Eric, and Deborah McCulloch to discuss Rhonda.

13 And we'd bring all four on without any inquiry by  
14 counsel. Then we'd stop, with or without a recess, and then  
15 we'll proceed with the Attorney General's Office calling  
16 each of the experts, if they choose, for any examination,  
17 direct or cross, and that will be up to each counsel.

18 And I put it in that order, unless the parties  
19 stipulate otherwise, because: One, there was a request for  
20 an evidentiary hearing; and two, separate from that, this is  
21 happening pursuant to an Order to Show Cause. That doesn't  
22 mean anybody has switched to burden of proof, but we do it  
23 in that order.

24 So that these individuals would give a narrative  
25 summary of 706 experts in their respective roles to give

1 counsel a precise idea of, well, they all signed off on the  
2 reports, but who interviewed whom and what was their  
3 specific part of this if it varied amongst the four.

4 So, when we get to that -- and then when that  
5 examination is done by counsel, then who -- if there are  
6 issues about who then is going to be called by each  
7 respective counsel, we'll proceed, accordingly.

8 And then as the agenda said, once all the  
9 testimony has been received, I'll refer to it generically as  
10 the Karsjens case. Then we'd hear arguments on Plaintiffs'  
11 Motion for an Aftercare Plan specific to the Karsjens case,  
12 argument on the habeas petitions with a reference to  
13 exhaustion of remedies, and then a discussion of filing of  
14 redacted versions of documents and briefs, including making  
15 completely unredacted versions available to the respective  
16 County Attorneys consistent with their request and their  
17 second amicus brief and notice provisions to them as the  
18 cases proceed. And then a discussion of scheduling. And  
19 what we mean by "scheduling" is moving up things, not moving  
20 them back.

21 So, where that leaves us now is we would likely  
22 first begin with an update on the SRB hearing that occurred  
23 on July 2nd from each party, then an update on the living  
24 situation of each party, then we'll proceed as we've  
25 indicated.

1 And then if there is an issue about order of  
2 presentation or how we have suggested that we'll be first  
3 having each of the four 706 experts come up, and then after  
4 the parties call them one at a time, our thought being that  
5 apart from the discussion of the Court to proceed in that  
6 fashion, it actually might assist counsel rather than  
7 stopping after each 706 expert and then examining so that  
8 you can see their respective roles in addition to what they  
9 have set forth in their report to the Court.

10 So, Mr. Gustafson, you stood up just a moment ago?

11 MR. GUSTAFSON: I can't resist, Your Honor.

12 As I understand E.T.'s SRB situation, the SRB  
13 ruled -- the hearing was on July 2nd. I believe the SRB  
14 ruled last Thursday or Friday. They agreed that he should  
15 be sent to CPS as requested by the Executive Director of the  
16 MSOP, Nancy Johnston. My understanding on where they are  
17 currently is that their living arrangements have not  
18 changed.

19 THE HONORABLE JUDGE FRANK: Well, and just because  
20 you mentioned it, that is in part the recommendation. The  
21 question I'm going to have is, actually, the SRB  
22 recommendation is moving Eric Terhaar into a "modified  
23 community preparation service program," and since he has  
24 been in Phase I we have some questions: Well, does that  
25 mean, as Judge Keyes and I discussed earlier and he may have

1 a follow-up here, that there would have to be another  
2 approach to the SRB Panel on community integration and  
3 provisional discharge issues?

4 MR. GUSTAFSON: We don't understand what that  
5 language means, Your Honor. As I understand it, there are  
6 no SRB members on the witness lists. That may not be right,  
7 but I think that's correct. So, I don't know what that  
8 language means, but it clearly suggests that there are some  
9 different plans in mind.

10 I think maybe perhaps Ms. Nancy Johnston might be  
11 able to answer those questions, I don't know. But as far as  
12 I understand it, their living situation has not changed.

13 THE HONORABLE MAGISTRATE JUDGE KEYES: And it  
14 wouldn't change at least until the period of time runs for  
15 the SCAP Panel to do anything about the SRB recommendations.  
16 Is that right?

17 MR. GUSTAFSON: That is my understanding is that  
18 the SCAP Panel has to issue an order before Mr. Terhaar  
19 could be moved.

20 With respect to -- I was just going to go on to  
21 tell you what we were thinking about the exhibits and see if  
22 that's acceptable. When we exchanged the exhibit lists, we  
23 went over the Defendants' exhibit list, and there were only  
24 a few items that were not on our list. We have some on ours  
25 that aren't on theirs.

1 But, anyway, we ended up making one joint list  
2 essentially which was filed last night, and the exhibits are  
3 all marked, premarked as Exhibit 1, 2, 3, 4, without regard  
4 to who offers them.

5 We don't think that there will be particular -- a  
6 lot of objections about the exhibits. I think that the safe  
7 way to say it is the State's view of this hearing is more  
8 limited than my view of this hearing, and so there will be  
9 objections as to certain topics, and with that will come or  
10 go some exhibits.

11 But, I don't think there will be much by way of  
12 objections to specific exhibits once the Court has  
13 determined that that topic is relevant for this hearing.  
14 And we thought we would offer them as we went --

15 THE HONORABLE JUDGE FRANK: All right.

16 MR. GUSTAFSON: -- as opposed to pre-admitting  
17 them.

18 MR. BRENNAMAN: Thank you, Your Honor. I have  
19 nothing to add on the SRB or the recommendation. The Court  
20 appears to have that. If the Court has questions about that  
21 language that appears in that, we will have Nancy Johnston.  
22 We plan to call her, and perhaps Jannine Hebert has  
23 something to say about that, as well, but hopefully those  
24 terms can get answered.

25 In terms of the SCAP process, under the statute at

1 this point, either the Commissioner or the County can  
2 petition for rehearing with the SCAP within 30 days of the  
3 issuance of the SRB recommendation. My understanding is  
4 that the Commissioner, even perhaps as early as today, will  
5 be sending a letter to the Supreme Court Appeal Panel  
6 indicating that she will not ask to petition for rehearing.  
7 I don't know, I haven't talked to the county, but if the  
8 county were to send in a similar letter expressing the  
9 intent not to petition for rehearing, then the SCAP at that  
10 point could issue an order granting the transfer. But, it  
11 does require an order from the SCAP. So, a number of things  
12 could happen, it's not completely in the control of the  
13 Defendants in this case.

14 With regard to exhibits, I agree with him that for  
15 many of them, especially the ones that deal with E.T. and  
16 R.B., in particular, we're probably not going to have any  
17 objections or problems with the admission of those  
18 documents.

19 However, there are some categories of documents  
20 that show up on the Plaintiffs' exhibit list that we do find  
21 objectionable. For instance, I think there are a number of  
22 articles from Dean Eric Janus in Exhibits 89 through 93 that  
23 we would object to. We do not believe that Mr. Janus should  
24 testify. I don't know if you want my complete argument on  
25 that subject right now or we can deal with it at the time.

1 THE HONORABLE JUDGE FRANK: Why don't we sit tight  
2 until we get to that.

3 MR. BRENNAMAN: Okay. But for the same reason  
4 that he should not testify, his article should also not come  
5 into the record on this evidentiary hearing.

6 Also, at Exhibit Nos. 78 through 87 are a number  
7 of studies, and I was just asking Dan before this hearing,  
8 we do not object to studies coming in to the extent they  
9 have been referenced by the Rule 706 experts. We think  
10 that's appropriate and fair game to talk about that in the  
11 context of their reports. But, as I understand from Mr.  
12 Gustafson, many of those studies are not referenced in the  
13 Rule 706 experts' reports, and are just studies.

14 And I do, when we get to those, want to have a  
15 conversation about how they relate, laying foundation,  
16 authenticity, all of those things that normally come up with  
17 evidence. So the State's position is we do not agree in  
18 advance that those should just come in.

19 Exhibit No. 77 is the Duvall papers that were  
20 filed by the Attorney General's Office. Those are already  
21 in the record for the Karsjens Class Action case. And so  
22 they are already a part of the case. I don't know what  
23 relevance they might have to this evidentiary hearing. So  
24 we would object to those on the basis of relevance and  
25 perhaps other things. So, we don't agree in advance that

1 that should come in.

2 And then finally, Exhibits 58 through 74 are  
3 emails between and among -- for the most part -- they are  
4 other things, as well, between and among people at MSOP  
5 about the SRB and SCAP process. Again, I don't know that I  
6 need to give my full argument now, but the State's position  
7 on this hearing is that evidence about futility of the SRB,  
8 the alleged futility of the SRB and the Supreme Court Appeal  
9 Panel process is not relevant to this evidentiary hearing  
10 about E.T. and R.B. That's an argument related to the  
11 habeas claims. And as I've already described, the State  
12 does not believe that we should be having an evidentiary  
13 hearing that relates to the habeas claims.

14 Additionally, if they want to talk -- I mean, we  
15 can talk about the SRB and SCAP process, but the State's  
16 position is we should talk about it in the context of E.T.  
17 and R.B. And as we know, E.T. has already completed the SRB  
18 process, you know, is moving to the SCAP process. I think  
19 we can have a conversation about him. R.B. has not  
20 petitioned, so she's not utilizing that process at this  
21 time. So, I don't know what the conversation would be with  
22 regard to her.

23 But, the more general information about futility,  
24 we believe, is a -- I'm sorry, the Department believes is  
25 just an end-run around the State's legal argument about how



1 we should not be having an evidentiary hearing on the basis  
2 of the habeas petitions.

3 So, that's our position on the exhibits.

4 THE HONORABLE JUDGE FRANK: You may not have been  
5 done yet, so maybe I was going to interrupt.

6 MR. BRENNAMAN: Please.

7 THE HONORABLE JUDGE FRANK: Two questions -- and I  
8 can tell Judge Keyes probably has one or two, as well.

9 The first question -- and we may have touched on  
10 this at the time of the last hearing. Under what  
11 circumstances can an individual, without going through the  
12 SRB and SCAP process, be moved from Moose Lake to St. Peter?  
13 Because we talked about one individual for health reasons  
14 that had been moved without any hearings. Under what -- are  
15 there -- and moved where at St. Peter? Are there  
16 circumstances under which the Commissioner can say, we're  
17 moving this person now to St. Peter?

18 MR. BRENNAMAN: Yes, I believe under the statute  
19 how it works is that the Department does have the authority  
20 to move individuals within the secure facilities that they  
21 operate. And so those facilities are the Moose Lake  
22 Facility and the St. Peter Facility. So, without  
23 approaching the SRB or the SCAP, it's my understanding that  
24 the Department, that MSOP can make the decision to move how  
25 they structure that environment and who moves where within

1 the secure environment.

2 Now, of course, that's subject to -- we're going  
3 to want to talk to Nancy Johnston and Jannine Hebert about  
4 what a good idea is, and is that a good idea, and so on and  
5 so forth. But my understanding is that unless they're  
6 proposing to put someone outside of the secure facility, for  
7 instance, and the community preparation services which is  
8 the transfer facility, or to a private placement that's  
9 outside of those two facilities, that would require them  
10 utilizing the transfer provisional discharge and discharge  
11 process under Chapter 253D.

12 Does that answer your question?

13 THE HONORABLE JUDGE FRANK: Yes. One other  
14 question, and I think I can tell Judge Keyes has -- one  
15 other question, and it may be fair for you to say, well,  
16 perhaps that question should come at the end of the hearing  
17 not at the beginning. But it does relate to scope of the  
18 hearing, even if everyone agreed on the scope with respect  
19 to the 1983, versus the habeas.

20 Let's just say as a for instance that I would  
21 conclude that E.T. is being unconstitutionally detained.  
22 Separate from even if a habeas had not been filed, what are  
23 the remedies that you and your client feel are available to  
24 the Federal Court if I would make that finding at the  
25 conclusion of this hearing or later on in the case?

1 I suppose in theory, the same question could be  
2 asked if what if the Court determined that the Class was?  
3 What remedies, given the issue that has come up with, well,  
4 there's the habeas remedies, then there's the 1983 remedies,  
5 what is your view as we go into this hearing on what the  
6 remedy would be if the Court would make that finding?

7 MR. BRENNAMAN: Sure. And we've briefed these  
8 issues extensively and I would encourage -- I would direct  
9 the Court to that briefing because it will explain it in far  
10 greater detail than I can right now.

11 But Defendants believe that the law is that in the  
12 context of a Section 1983 action, the law is very clear, the  
13 case is *Heck v. Humphrey*, that a -- and the *Pressier* case  
14 both state that a Federal Court does not have the power to  
15 release an individual who is in state custody. That is only  
16 a remedy that is available to a Federal Court under Federal  
17 Law 2254, Habeas Corpus.

18 So, if the Judge intends to have a hearing today  
19 in the Karsjens Class Action case, I think what we're  
20 talking about, then, is not release from commitment, what  
21 we're talking about is the Court does have, of course,  
22 injunctive powers to issue injunctions against Defendants.  
23 So, that is the type of relief that the judges have  
24 available to them. But, I think that the type of injunctive  
25 relief that is ordered by the Court cannot include

1 situations or conditions that would amount to anything that  
2 has to do with the fact or duration of the commitment, in  
3 other words, getting out of commitment, because that is the  
4 territory only of habeas corpus.

5 And insofar as habeas corpus, it sounds like maybe  
6 we're not going to be talking about those issues at least  
7 that much during this evidentiary hearing. That is an area  
8 of law I'm getting to know much better for the first part,  
9 but also it's an area of law that has many rules and  
10 technical obstacles, state exhaustion being one of them.  
11 But, there are also a number of other rules about if you  
12 have an evidentiary hearing, it can only be for such and  
13 such purposes, not the sort of thing we're contemplating  
14 here today.

15 So, we also -- Defendants' position -- I'm  
16 sorry -- the Respondent Commissioner's position is that  
17 relief on those habeas petitions is also improper at this  
18 time.

19 THE HONORABLE JUDGE FRANK: Did you have anything?

20 THE HONORABLE MAGISTRATE JUDGE KEYES: I just have  
21 a procedural one.

22 Would it make more sense to admit now all the  
23 exhibits other than the ones to which the State reserves  
24 objections so we don't have to waste time seriatim going  
25 through this? So in other words, all exhibits would be

1 admitted except for 89 to 93, 78 to 87, 77, and 58 to 74?  
2 (All exhibits provisionally admitted with the  
exception of 58 to 74, 77 to 87 and 89 to 93.)

3 MR. BRENNAMAN: State has no objection.

4 MR. GUSTAFSON: Your Honor, we didn't go through  
5 the exhibits with that kind of process in mind, so we  
6 actually haven't looked at it. But I'm fine with it. If we  
7 come to one that I really have to object to, we can go back  
8 and revisit it.

9 THE HONORABLE JUDGE FRANK: Here is maybe the way  
10 we can handle that. We'll provisionally receive them,  
11 provisionally under Rule 104. I'll just state in the event  
12 we get to the end of the hearing, and whether it's  
13 Respondent or Plaintiff saying, well, we didn't read that  
14 exhibit, we won't reargue anything, but if you miss  
15 something, because that sometimes happens in front of a --

16 MR. GUSTAFSON: That is fine, Your Honor.

17 THE HONORABLE JUDGE FRANK: -- jury. Something  
18 familiar we see so we can move through the witness and then  
19 at the end saying, well, whether it's received for all  
20 purposes -- so, we'll handle it in that way.

21 MR. GUSTAFSON: That's fine, Your Honor.

22 THE HONORABLE JUDGE FRANK: Now, absent anything  
23 further by counsel, it would be our intent to -- yes?

24 MR. BRENNAMAN: Did you intend to clarify the  
25 issue about the use of the individuals' names?

1 THE HONORABLE JUDGE FRANK: I'm assuming that  
2 individuals, you can refer to them by name. We're in a  
3 public courtroom, and rather than speculate about how  
4 everybody has figured out -- and so then I guess once we've  
5 reached across that bridge, then it would be referring as  
6 Mr. and Ms. to their last name. There's always some  
7 exceptions where a witness demands to be called by their  
8 first name.

9 But, we're assuming that absent some compelling  
10 reason that we should know, that we'll proceed with the use  
11 of their names. Mr. Gustafson?

12 MR. GUSTAFSON: Ready for opening statements?

13 THE HONORABLE JUDGE FRANK: Well, I thought what  
14 we'd do is to give you an advantage, each of you, on -- it  
15 might or might not affect -- I know the late Irving Younger  
16 would say we're all supposed to have 99 percent of our  
17 opening statements and closing arguments ready before trial.  
18 I don't know if I was ever able to quite accomplish that. I  
19 don't know about you, Judge Keyes.

20 But what we thought we'd do is have each expert  
21 come on and give their role and narrative summaries, and  
22 then before each of you call them for whatever purpose you'd  
23 like to call them individually, then give your opening  
24 statements. It may or may not affect something you say or  
25 don't say, or it may or may not answer or raise a question.

1 It might be advantageous to both parties if we did it in  
2 that fashion.

3 MR. GUSTAFSON: Fine with me, Your Honor.

4 MR. BRENNAMAN: The State would prefer to do  
5 opening statements first.

6 THE HONORABLE JUDGE FRANK: Why don't we just go  
7 ahead with opening statements, then? Now, it looked like,  
8 whether you had chatted or not, the Plaintiff was going to  
9 go first, and then second if that's agreed to by counsel,  
10 we'll proceed with that.

11 So, what that would mean for the four of you,  
12 we'll hear their opening statements and then with or without  
13 a short recess. We'll see where we're at, then we'll go in  
14 that order in which we have them.

15 So, Mr. Gustafson?

16 MR. GUSTAFSON: Thank you, Your Honors.

17 THE HONORABLE JUDGE FRANK: And if we get to the  
18 point, whether it's for a witness or opening statement, if  
19 there's some exhibit up here, even though there's a plasma  
20 screen there and all the lawyers have a screen, without any  
21 intent to create mood lighting in here, I'll dial down the  
22 light at a preset for the screen up here.

23 OPENING STATEMENT

24 MR. GUSTAFSON: Thank you, Your Honors. Dan  
25 Gustafson, again, on behalf of the Plaintiffs and the Class.

1           Mr. Eric Terhaar and Rhonda Bailey are both  
2           civilly committed sex offenders in Minnesota; and therefore,  
3           both members of the Class.

4           As you know, Plaintiffs in the Class allege  
5           various constitutional claims, other claims including  
6           Section 1983 claims for constitutional claims relating to  
7           the Fourteenth -- related to violations of the Fourteenth  
8           Amendment.

9           For purposes of today, there are really three main  
10          constitutional arguments that may rise. First, a failure of  
11          treatment, second, that Minnesota statute Section 253B/D as  
12          it was amended is unconstitutional as applied, particularly  
13          with respect to Mr. Terhaar because it is punitive in  
14          nature; that is, it detains people that are not either in  
15          need of treatment or dangerous to society.

16          Second, that the statute doesn't provide any  
17          meaningful opportunity for release; that is, the release  
18          statute is being applied unconstitutionally under the law of  
19          Minnesota, the *Call* case and the *Foucha* case out of the  
20          United States Supreme Court. Plaintiffs take the position  
21          that there are two primary problems with the release  
22          statute.

23          First of all, there's no independent review, as  
24          you know, which was subject to another motion that  
25          Plaintiffs have filed. And secondly, there's no judicial



1 bypass system whereby a person who is in the situation that  
2 Mr. Terhaar finds himself today; that is, where five  
3 independent experts have found him not to be a danger to  
4 society, there is no way for him to avoid the SRB/SCAP  
5 process, which we will, depending on the Court's evidentiary  
6 rulings, invoke testimony that can take two to three to four  
7 to five years to follow that process before release can be  
8 obtained. And the lack of a judicial bypass, as is in the  
9 case, for example, in the Wisconsin statute. At any time a  
10 person who is committed in Wisconsin can file a petition  
11 with the committing court to be released because they no  
12 longer satisfy the commitment criteria.

13 That's missing in the Minnesota statute. There's  
14 no independent review in the Minnesota statute. As Your  
15 Honors are well aware, had there not been the independent  
16 review ordered by this Court in February of 2014 and these  
17 four court-appointed experts had done the work we're going  
18 to talk about today, Mr. Terhaar would still be in Moose  
19 Lake unknown to the Court and unknown to the Plaintiffs as  
20 someone who should not be -- continue to be restrained in  
21 this way.

22 The third thing, of course -- and this deals more  
23 with Ms. Bailey, is the lack of less restrictive  
24 alternatives. We've made that argument already.  
25 Your Honors have heard arguments on it. But, her case

1 presents testimony now that we expect will show that the  
2 facilities and the treatment of Ms. Bailey are not  
3 constitutionally adequate.

4 As I mentioned earlier, we think the habeas claims  
5 for both Mr. Terhaar and Ms. Bailey don't need to be heard  
6 today. We think the evidence overlaps, and we'll have  
7 argument on that tomorrow. So, we don't intend to press any  
8 of the evidence that we would otherwise bring at a habeas  
9 hearing today, at least not before the Court hears argument  
10 on the issues.

11 As you know, we didn't do any discovery with  
12 respect to this evidentiary hearing with the exception that  
13 we serve some depositions on written questions on the State,  
14 and we had a telephone conversation with the four  
15 court-appointed experts; but, we didn't take any  
16 depositions. So, I'm basing my comments on what I think the  
17 evidence will show based on the affidavits and my  
18 expectations of what the answers will be to some of the  
19 questions that get provided.

20 First of all, with respect to the court-appointed  
21 experts, I don't think there's any question that they're  
22 highly qualified in the field of sex offender assessment and  
23 evaluation. They're well-educated, well-experienced, and I  
24 don't think there's any question that they would qualify for  
25 experts, even if the Court hadn't already appointed them.

1 They've offered these joint opinions on Mr. Terhaar and  
2 Ms. Bailey, and let me just take them briefly in stride.

3 With respect to Mr. Terhaar, I don't think there's  
4 any question that the experts unanimously believe  
5 Mr. Terhaar should be released immediately without  
6 conditions. Both in their reports and in the conversations  
7 we had on the teleconference, it was clear that they no  
8 longer believe that he poses any danger -- or I shouldn't  
9 say any danger -- that he poses an unreasonable danger to  
10 society. That's a test that must be satisfied by the State  
11 of Minnesota. They must demonstrate it by clear and  
12 convincing evidence under the *Addington* case of the Supreme  
13 Court. I don't think there's any question about the  
14 standard with respect to that. And I think the expert  
15 testimony, the unanimous expert testimony is that  
16 Mr. Terhaar doesn't satisfy that standard.

17 There's some discussion, we expect, from those  
18 experts with respect to why the actuarial tools that were  
19 used to justify his initial commitment and the risk  
20 assessments that have been done on him don't work  
21 particularly well for juveniles. We expect to hear  
22 testimony that the recidivism rates for juveniles who commit  
23 sex offenses are similar to the recidivism rates for  
24 juveniles who don't, who have non-sex offenses. And I think  
25 we expect to hear from the experts that there is little

1 evidence to suggest that Mr. Terhaar is a risk.

2 We think Mr. Terhaar should be released and we  
3 think this Court -- while we generally agree with the State  
4 that Section 1983 does not give this Court the power to  
5 unconditionally release Mr. Terhaar, that is a subject that  
6 must be taken up by a habeas petition. We do think the  
7 Court has beyond injunctive powers. We think the Court has  
8 declaratory judgment powers to declare the statute either  
9 facially or as applied to Mr. Terhaar to be  
10 unconstitutional. And that, of course, will set in motion a  
11 series of events which will assist his release if, in fact,  
12 habeas is the only remedy that he has.

13 With respect to Ms. Bailey, we think the 706  
14 experts have properly evaluated her records. And through  
15 the interview with her and with some MSOP, -- it's not clear  
16 to me whether it was an MSOP psychiatrist, Dr. Beth Johnson,  
17 I believe her name was. They had some interviews with her  
18 that we're going to hear testimony that her placement in an  
19 all-male facility is highly inappropriate; that her  
20 treatment plan, while recognizing at times that she needs a  
21 specific treatment plan related to her and her gender has  
22 never been implemented.

23 There is some evidence in her treatment file that  
24 they recognize that she suffers from an incredibly traumatic  
25 childhood that has not been addressed, although the State

1 has recognized that problem, and that her treatment and  
2 placement are actually not helping her, but hurting her.  
3 And we think the failure to treat the trauma, and the  
4 placement, living arrangements in an all-male sex offender  
5 unit and taking group therapy with all men, we will hear the  
6 experts say that that is not within the range of  
7 professional standards. She should be transferred to a  
8 different living arrangement, and that she should be given a  
9 different treatment plan.

10 We have one independent expert who was hired by  
11 the State of Minnesota, Dr. Amanda Powers-Sawyer.  
12 Essentially, she is a qualified sex offender assessment  
13 expert. She testifies with some frequency before the  
14 District Court in Minnesota. She's written articles on  
15 juvenile offenders and recidivism rates.

16 I would say that her opinion essentially mirrors  
17 the opinion of the 706 experts with respect to Mr. Terhaar.  
18 She was not asked to evaluate Ms. Bailey, and the State did  
19 not hire an independent expert to evaluate Ms. Bailey  
20 separately from the Court's 706 experts.

21 The only other witness that we see from the  
22 Plaintiffs' perspective is Executive Director of the MSOP,  
23 Nancy Johnston. This is where we get into an area of  
24 disagreement with the State on the scope of this hearing.  
25 We think the scope of this hearing -- the State has taken

1 the position -- and I won't make the long argument now --  
2 but the State has taken the position that the discharge  
3 procedures are adequate and can discharge the constitutional  
4 rights of E.T. and -- I'm sorry, of Mr. Terhaar and Ms.  
5 Bailey.

6 We take the position that the discharge procedures  
7 are not adequate for the reasons I stated earlier, the lack  
8 of an independent review, lack of a judicial bypass. And we  
9 intend to seek testimony from Ms. Johnston about the process  
10 and the incredible lengthy delays that occur as the result  
11 of that process.

12 We also intend to elicit testimony from Ms.  
13 Johnston about what I think is a very novel, direct or  
14 initiated petition with respect to Mr. Terhaar. We think  
15 it's unprecedented in that he's a Phase I -- he's in Phase I  
16 and now seeking to move him to CPS. I think the testimony  
17 will be that's never been done before.

18 I think the testimony will also be that he wasn't  
19 consulted about that petition. His lawyer wasn't consulted  
20 about that petition. The Department did it on their own. I  
21 think the testimony will be that the Department did it in  
22 response to this Court's Show Cause Order.

23 And as you know, from the record that's already  
24 been produced as a result of the hearing two weeks ago or  
25 so, the people within MSOP don't agree with that decision.

1 The treatment people have one view, the risk assessment  
2 people have a different view, and the executive director has  
3 yet a third view, and the independent experts all disagree  
4 with them.

5 So, I think that we're going to hear about the  
6 process that was undertaken to file that petition and get  
7 some answers with respect to why it is that Ms. Johnston  
8 filed that petition.

9 Let me just say, the filing of that petition and  
10 the order by the SRB now precludes Mr. Terhaar under current  
11 Minnesota law from filing another petition until this  
12 petition process is complete. So, until the SCAP Panel  
13 rules and all Court of Appeals and Supreme Court decisions  
14 are final, and then for a period of six months later he  
15 can't file a contrary petition. So, his right to petition  
16 for automatic release has been taken away by the filing of  
17 Ms. Johnston's petition or the ruling of the SRB on that  
18 petition.

19 In addition, I think Ms. Johnston will testify  
20 that the SCAP Panel cannot issue an order that is  
21 inconsistent with the decisions, the issues that were  
22 presented to the SRB Panel. So, for example, the SRB  
23 petition asked for a transfer to CPS. It didn't ask for an  
24 unconditional discharge. So the SCAP Panel now cannot say,  
25 well, we disagree with the SRB and we think that it should

1 unconditional discharge, because that was never presented to  
2 the SRB Panel. The best they could do is say, we disagree  
3 and send it back for a new SRB hearing. It's my  
4 understanding, but we intend to ask Mrs. Johnston.

5 With respect to the evidence of the remaining  
6 witnesses, we would expect to cross-examine the other  
7 witnesses that the State calls, which we understand that  
8 they expect to call Mr. Terhaar and Ms. Bailey,  
9 Ms. Pascucci, Laura Herbert, I think it is, Dr. Hebert, and  
10 perhaps several other MSOP people; but, we wouldn't offer  
11 evidence with respect to that.

12 Your Honor, just very briefly, the law is clear on  
13 this issue. It's been settled for many years. The State  
14 cannot continue to hold Mr. Terhaar once it's determined  
15 that he is no longer dangerous. Under 1983, we have the  
16 burden to raise a constitutional violation. We've alleged  
17 that in our Complaint. We're going to put on evidence today  
18 that suggests he's being held in violation of the Fourteenth  
19 Amendment.

20 The standard is clear, the State has to prove it  
21 by clear and convincing evidence that he still satisfies  
22 those two elements, that he is in need of treatment and that  
23 he is a danger to society or a risk to society.

24 And I suggest the evidence today, that it is  
25 impossible for the State to carry that burden. Whether you



1 characterize clear and convincing as 66 percent or 75  
2 percent or 55 percent, something more than a preponderance,  
3 something less than beyond a reasonable doubt, but in the  
4 face of five independent experts who have no interest in the  
5 outcome of this case, other than that they were asked to  
6 provide their professional opinion, in the face of five  
7 independent experts, I don't see how the State can carry  
8 their burden.

9 And *Call* made clear -- *Call*, the Minnesota Supreme  
10 Court case, 1995, made clear that the elements in the  
11 Minnesota Discharge Statute, this adjustment to an open  
12 society and this notion that you have completed treatment  
13 that has been engraft upon this discharge procedure by the  
14 MSOP, and the Minnesota Legislature cannot stand -- the *Call*  
15 Court made clear that the only way that this discharge  
16 practice is constitutional is if they read it to only  
17 include the two factors from the *Foucha* case.

18 As I said, we have the burden of proof on the 1983  
19 claim. Once we raise those issues, the State has to prove  
20 by clear and convincing evidence that the continued  
21 commitment of Mr. Terhaar is satisfied by that. And I  
22 submit that they can't -- they can't satisfy that.

23 With respect to Ms. Bailey, of course you  
24 understand, Judge, that our view is it's the professional  
25 judgment standard of *Youngberg* and *Bailey* as adopted by the

1 Eighth Circuit; that such a substantial departure from  
2 professional standards that judgment was not based on  
3 professional judgment. That's our view of the burden that  
4 should be applied to Ms. Bailey with respect to her  
5 treatment and placement.

6 We think that testimony will come again from Nancy  
7 Johnston that move from the Minnesota Security Hospital to  
8 the St. Peter Sex Offender was an administrative move that  
9 was ordered in 2008 when Mr. Benson was the head of the  
10 program. It was not a decision that was made related to  
11 their treatment. It was administrative convenience and  
12 coordination of the program so that all of the people  
13 civilly committed by the sex offender would be in one place.

14 We don't think that satisfies *Youngberg's*  
15 professional judgment standard. But, beyond that, even if  
16 you buy the *Salerno* or *Strutton* shocks-the-conscience  
17 standard, it shocks my conscience. She's the only woman  
18 being held with 22 male sex offenders. And I don't think  
19 that the State can sustain their burden, whether it's the  
20 shocks-the-conscience standard or whether it's the  
21 professional judgment standard, because I think the  
22 testimony is that this kind of placement and this kind of  
23 treatment is simply unacceptable. It's outside of the  
24 boundaries of any professional judgment. And we think under  
25 either standard, it wouldn't be appropriate.

1           Essentially, the State, and I think Dr. Hebert  
2     will testify to this, perhaps Ms. Johnston, as well. It's  
3     not that they don't want to have a separate facility for  
4     R.B., it's not that they don't want to tailor her program to  
5     an all-female kind of setting. They don't have the  
6     facilities, which suggests it's because they don't have the  
7     resources. And I say that's not a professional judgment.  
8     The lack of resources and putting someone together with men  
9     in an inappropriate living and treatment situation because  
10    of money, budgetary constraints or because of administrative  
11    convenience or any reason other than the professional  
12    judgment that that would be the appropriate treatment fails  
13    the *Youngberg* standard, and I frankly say fails the  
14    shocks-the-conscience standard.

15           At the end of the day, Your Honors, we're going to  
16    ask you to declare that the discharge procedure for  
17    Mr. Terhaar is constitutionally inadequate under the due  
18    process clause of the Fourteenth Amendment, and that the  
19    constitutional rights of Ms. Bailey are being violated under  
20    the professional standard announced by the Supreme Court in  
21    *Youngberg* and adopted by the Eighth Circuit in the *Bailey*  
22    case.

23           THE HONORABLE JUDGE FRANK: Thank you.

24           Whenever you're ready, counsel?

25           OPENING STATEMENT

1 MR. BRENNAMAN: Thank you, Your Honors. Nathan  
2 Brennaman here again on behalf of the Defendants.

3 Well, Mr. Gustafson makes it all sound very black  
4 and white, but I think what the evidence is going to show in  
5 this hearing above all is that these are difficult issues.  
6 They're complex issues regarding Mr. Terhaar and Ms. Bailey.

7 The Rule 706 experts' reports unquestionably  
8 identify issues, but they aren't quite as detailed about  
9 solutions and recommendations about what should happen with  
10 Mr. Terhaar and Ms. Bailey.

11 For example, Ms. Bailey, she's housed with men.  
12 The Rule 706 experts don't like that. But they don't  
13 identify a placement for her with women. They don't --  
14 either because they're unaware or it's not in their report,  
15 but if they testify consistently with my conversation with  
16 them the other day, they're not aware of another placement  
17 in Minnesota that will take Ms. Bailey that is both secure  
18 enough and has all of the treatment resources that are  
19 needed for her care.

20 And so, Mr. Gustafson argues administrative  
21 convenience and resources. I don't think that anyone is  
22 going to testify that resources are an issue, so far as I  
23 can tell. Obviously, the resources of the State are not  
24 unlimited, but I don't think that that is going to be the  
25 first argument that the Department makes.

1 In terms of administrative convenience, I think  
2 that the Affidavit of Nancy Johnston was clear. It's  
3 already in the record of this case. But, I believe her  
4 testimony is going to be that when she was at MSH, she was  
5 already housed with men. She went from being housed with  
6 men at MSH to being housed with men at MSOP. So this  
7 argument that that administrative decision to unify and get  
8 all sex offenders together to provide cohesive sex offender  
9 treatment to Ms. Bailey is not a grounds to say that there  
10 was anything unconstitutional with her care.

11 So, the question for Ms. Bailey is not -- you  
12 know, I think that the Department is willing to recognize  
13 the downsides of this particular placement for Ms. Bailey.  
14 And it's open to having a discussion about this. In fact,  
15 it's probably glad we are. But there's down sides with any  
16 placement, she shouldn't be placed with men; that's the  
17 testimony of the Rule 706 experts. I think everyone is  
18 going to agree that she shouldn't be housed alone, that that  
19 wouldn't be therapeutic for her. And so, should she be  
20 placed with women? I think that's what the Rule 706 experts  
21 are going to describe for us.

22 But, I think the testimony is also going to show  
23 that that, too, carries some downsides. For instance,  
24 Ms. Bailey has offended against women that she has been  
25 housed with in the past during times, periodic times during

1 her commitment. And so, what type of additional security  
2 measures do we need to be thinking about if she is going to  
3 be placed with women.

4 Additionally, she is the only female civilly  
5 committed sex offender in the State of Minnesota. If she's  
6 housed with women, she's very likely not going to be able to  
7 be housed with female sex offenders, just because there  
8 aren't very many female sex offenders in the State of  
9 Minnesota. So, that changes -- as the testimony of Jannine  
10 Hebert will explain, that changes the treatment of  
11 Ms. Bailey. She goes from being in a place that provides  
12 treatment, to a place that does not, and treatment either  
13 has to come in to her or she needs to go out and get  
14 treatment, and that is stressful.

15 I think that the testimony is going to come in  
16 that Ms. Bailey -- you know, they have been making efforts  
17 to put her in contact with other women within their ability  
18 within the Minnesota Security Hospital, and in fact,  
19 Ms. Bailey has asked that that stop because it's been too  
20 stressful for her and it's triggering in her some of these  
21 sexual offense feelings. And so, that's Rhonda Bailey, and  
22 I think the testimony is a little bit more complex than Mr.  
23 Gustafson would have you believe.

24 With regard to Mr. Terhaar, the evidence will show  
25 that he is getting treatment at the Minnesota Sex Offender

1 Program, and that that treatment, at least in part, has  
2 helped his improvement. And I think all the testimony will  
3 show that he has improved over the past years, both through  
4 that treatment and through him getting older and more  
5 mature.

6 But, if the Rule 706 experts testify consistently  
7 with my conversation with them on the phone the other day,  
8 they're going to say that the primary problem with regard to  
9 Eric Terhaar is he never should have been committed in the  
10 first place. So, it's not a problem with these Defendants,  
11 it's a problem that juvenile offenders of this kind, it's  
12 hard to measure risk -- and we're going to hear a lot about  
13 that. But juvenile offenders of this kind who have an  
14 offense history from ages 10 to 14, you know, are not -- I  
15 get the sense from the Rule 706 experts that they're going  
16 to testify that MSOP just probably isn't the best placement  
17 for them.

18 Now, I don't know that they're going to be able to  
19 explain -- again, I'll make the same comment that Mr.  
20 Gustafson did: We're all sort of roaming around in the dark  
21 here because of the short timeframes and limited ability of  
22 us to develop the testimony prior to the hearing. But I'm  
23 not sure whether the Rule 706 experts are going to be able  
24 to identify for us another better placement for Eric Terhaar  
25 that was available to the committing Court at the time he

1 was committed. We'll see.

2 But he was committed to MSOP. MSOP has been  
3 attempting to treat him, has been treating him, and that  
4 treatment has in part, at least, has gotten him to this  
5 point where the 706 experts believe that he should not be  
6 there.

7 The Rule 706 experts report and the Plaintiffs'  
8 counsel uses the dramatic language, "immediate unconditional  
9 discharge," but I believe the evidence is going to show at  
10 this hearing that nobody believes, not the Rule 706 experts  
11 or anybody else, that that means that the front door of the  
12 MSOP Moose Lake facility opens, he walks out, and there's no  
13 plan, there's no structure, there's no support, there's no  
14 nothing for Mr. Terhaar.

15 I think everyone is going to tell you, Judges,  
16 that that is a bad idea. He needs support, he's been  
17 institutionalized since he's been 10 years old. He doesn't  
18 have many of the skills he needs to successfully reintegrate  
19 into society. He has -- I think the testimony will show --  
20 he has continuing treatment needs. He has employment needs.  
21 He has housing needs. He has financial needs. He has --  
22 and I think the testimony will show if it's consistent with  
23 the ECRC report that just come out, that even Mr. Terhaar  
24 himself has serious reservations about going out on his own,  
25 even living at his father's house, which was suggested in



1 some of the papers that were filed prior to this hearing.

2 So, what is the structure that he needs? What is  
3 the structure that he wants? What is the process for  
4 reintegrating him back into society? Now, the Defendants'  
5 position is -- the defense -- if he's unconditionally  
6 discharged, he's unconditionally discharged. The  
7 Commissioner loses, and that's the whole point. The  
8 Commissioner no longer has any control over Mr. Terhaar, and  
9 the ability to provide him with those supports is extremely  
10 limited.

11 The Department, in choosing transfer to CPS so  
12 that they can start talking about provisional discharge is  
13 an attempt for them to use the tools they have to  
14 successfully reintegrate him into society. Transfer is  
15 appropriate because they can begin to talk, reintegrate him  
16 outside the razor wire into society to have him go out, see  
17 how he feels, come back, talk about it, start learning the  
18 skills he's going to need to successfully reintegrate into  
19 society, at which point they can start talking about  
20 provisional discharge.

21 But if you take away those tools from the  
22 Department, Your Honors, if you say, no, unconditional  
23 discharge, well then, you know, this thing that everyone  
24 seems to be saying needs to occur, transitioning, you're  
25 going to take it out of the control of what the Department

1 is able to do.

2 The evidence is also going to show that to the  
3 extent that the Rule 706 experts have identified problems,  
4 they're not class-wide problems. We're here talking today  
5 about the only female committed sex offender in the State of  
6 Minnesota and her placement among men. That is a problem  
7 that does not affect any other member of the Class. And so,  
8 to the extent that Mr. Gustafson wants to leverage this  
9 hearing into class-wide arguments based on the entire Class,  
10 that is sure an uphill battle.

11 To the extent of E.T., the primary problem that's  
12 been identified by the Rule 706 experts is that he's a young  
13 adult who only offended while he was -- his only criminal  
14 sexual history is between the ages of 10 and 14. And for an  
15 individual like that, what I think they're saying -- I want  
16 to ask them and have them say it themselves -- but for an  
17 individual like that, MSOP may not be the best placement for  
18 that individual, either.

19 And so, that again -- I want to ask the question,  
20 I don't know if they've had a chance to review every single  
21 person in the young adult program and whether Terhaar is the  
22 only one or whether we can expect more reports coming. So,  
23 I don't know if that's a problem that exists for more than  
24 just Eric Terhaar, but it sure doesn't apply to everybody in  
25 the Class. So, we're here today, we're having this

1       evidentiary hearing on these two individuals, but I don't  
2       know how much the Court is going to learn about the  
3       class-wide issues in the case.

4               Now, the Court -- I'd also like to talk about  
5       scope and relief. Those are the two things that Ms.  
6       Schaffer e-mailed us about that we should touch on in the  
7       opening statement. We do believe that we should be talking  
8       about E.T. and R.B.. There seems to be a consensus here  
9       both among the Judges and Mr. Gustafson that that's the  
10      scope of this. We're not getting into the habeas issues,  
11      but this just relates to E.T. and R.B. in the context of the  
12      1983 case.

13             Mr. Gustafson, I know, wants to talk about the SRB  
14      and SCAP process. The State would object to that in terms  
15      of scope. We're here today on -- if we're here today, we're  
16      here today on the Order to Show Cause and the Motion for  
17      Immediate Transfer of R.B. So, the Order to Show Cause is  
18      just on E.T., and the Motion for Transfer of R.B. is just  
19      about R.B.. We're not here today -- and Mr. Gustafson has  
20      not brought any motion that as a procedural matter would  
21      allow this Court or should -- you know, that would -- that  
22      the Court should use to hear a broader discussion about the  
23      issues of SRB and the Supreme Court Appeal Panel process.

24             So, we can certainly talk about Eric Terhaar's SRB  
25      process that he just went through. We can talk about the

1 Supreme Court Appeal Panel process that he's likely to  
2 encounter, what the steps are, what the eventualities are  
3 for him in that process. You know, I don't know what we  
4 would talk about on that in terms of Ms. Bailey, because she  
5 does not currently have a petition for transfer or  
6 provisional discharge -- or discharge.

7 So, there's nothing relevant on those topics to  
8 talk about with regard to her. So, we are consistently --  
9 and what he's trying to do, I think, is, as I suggested just  
10 beforehand is do -- you know, what he's trying to prove is  
11 futility of the SRB and SCAP processes, and the reason he  
12 wants to get evidence in on that is because that evidence is  
13 directly related to the habeas petitions. But if we're not  
14 talking about the habeas petitions today, we're not talking  
15 about the habeas petitions today. We shouldn't be hearing  
16 about futility of the SRB and Supreme Court Appeal Panel  
17 processes.

18 With regard to relief, the Defendants would ask  
19 the Court to withdraw the Order to Show Cause or resolve  
20 that in some way and allow the transfer process to go  
21 forward so that they can attempt to provide Mr. Terhaar with  
22 a deliberate and responsible transition into society.

23 With regard to Ms. Bailey, I think the Defendants  
24 are more open to have a conversation about it in the context  
25 of this hearing. If someone has a good idea about a

1 placement for her that makes sense, I think that the  
2 Defendants are open to it. And we're going to be asking a  
3 lot of questions of the Rule 706 experts.

4 Frankly, the options open to the Department are  
5 not that great. They don't have control over transfer  
6 provisional discharge and discharge, as the Court knows. So  
7 the options that they have available to them are options  
8 within the St. Peter Campus.

9 Now, should she be housed with mentally ill and  
10 dangerous and mentally-ill women who are vulnerable  
11 themselves? I don't know, that may have -- as I discussed  
12 before, that may have positives, but it may also have  
13 negatives. So I think Jannine Hebert is the one who's  
14 really going to be able to describe for us what the options  
15 are, what the pros and cons of these options are and what  
16 we're talking about in that regard.

17 And so, as far as the Plaintiffs' Motion to  
18 Transfer R.B., you know, we're not really talking about  
19 transfer, here. If people keep using the language of the  
20 statute, I mean, it would really be injunctive relief from  
21 the Court to house her somewhere within a secure facility.  
22 I think that's what's open to the Court. So technically,  
23 we're asking for denial of that motion, or at least denying  
24 in part.

25 Finally, I'd like to touch on the use of the Rule

1 706 experts. The Defendants are interested in getting --  
2 the Rule 706 experts were appointed at a time in the case  
3 when we were talking about the Class nature of the claims,  
4 and that has evolved over time. And I think the evidence is  
5 going to be that the Rule 706 experts have gotten some  
6 specific instruction from the Court to identify these type  
7 of individuals who are not like others in the sense that  
8 they should not be in the program or that they have  
9 characteristics that make them unsuitable for Moose Lake.

10 And the Defendants would like that the Rule 706  
11 experts are instead redirected to start talking about class  
12 issues again. Instead of talking -- their efforts have led  
13 us today to be talking about the only woman in the program  
14 and a juvenile offender in the program, people who are not  
15 like anybody else in the Class. Defendants understood that  
16 when the Rule 706 experts were appointed, that they would be  
17 looking at class-wide issues, issues that affected each  
18 Class member equally.

19 I don't think that's what we're talking about here  
20 today, and I don't think that that's the use of these Rule  
21 706 experts. These Rule 706 experts have been appointed in  
22 the Karsjens case, which is a certified Class case. They  
23 should be looking at issues that apply equally to each Class  
24 member, or we are going to have to start talking about  
25 commonality issues again, subclasses, whatever the Court

1 wants to do.

2 But the other relief that the Defendants would ask  
3 for is that the Court redirect the experts to start looking  
4 at Class issues once more. Thank you, Your Honors.

5 THE HONORABLE JUDGE FRANK: I think -- we'll take  
6 a recess, but I think that between questions by the Court  
7 and the attorneys, you'll have ample time to ask them what  
8 they're doing. And so, we'll take a 15-minute recess and  
9 we'll come back and hear from each of the four experts.

10 (Recess.)

11 THE HONORABLE JUDGE FRANK: You may all be seated.  
12 Thank you.

13 One issue that is unrelated to the -- I'll turn my  
14 microphone on. One issue that's unrelated to -- we'll be  
15 now asking each of the 706 experts to take the stand  
16 consistent with our introductions this morning.

17 One issue unrelated to everything that has  
18 happened thus far today, but so that there's no  
19 misunderstanding, regardless of who's in courtroom, when  
20 we're at a recess, provided that it's acceptable to  
21 Plaintiffs' counsel, if either Ms. Bailey or Mr. Terhaar  
22 want to speak, whether it's with his father or concerned  
23 person, if they -- as long as they can sit at counsel table  
24 with counsel there, that's acceptable to the Court. I just  
25 talked to the deputy marshals -- to the marshals. And so

1       that's -- if somebody needs additional guidance from the  
2       Court, it's a nonissue, as far as we're concerned.

3               MR. GUSTAFSON: Thank you, Your Honor.

4               THE HONORABLE JUDGE FRANK: All right? Then I  
5       will call, would ask Dr. Robin Wilson to kind of walk  
6       towards the witness stand. Before you step in, I will  
7       administer the oath to you.

8               (Witness sworn.)

9               And there is a step up there, if you'd please have  
10      a seat behind the microphone?

11              THE WITNESS: Thank you, sir.

12              THE HONORABLE JUDGE FRANK: And these aren't the  
13      fancy entertainer microphones, so you have to speak, stay  
14      fairly close to the mike or it won't pick you up.

15              If you'd please state your full name and spell  
16      your last name for the record?

17              THE WITNESS: My name is Dr. Robin Wilson. That's  
18      W-i-l-s-o-n.

19              THE HONORABLE JUDGE FRANK: And perhaps you could  
20      very briefly give your background. Our intent in having you  
21      up there, unlike a non-706 witness, is to just briefly give  
22      your background, and then in narrative fashion give an  
23      overview of your involvement thus far in the case,  
24      understanding that while I haven't taken part in the  
25      conversations, the four of you have talked about kind of



1 explaining each of your roles so that, in other words, it's  
2 not a situation where each of the four individuals are going  
3 to get up and just repeat exactly the same thing.

4 But I did ask through Mr. Ferleger, so that  
5 counsel's aware, what order -- Judge Keyes asked what order  
6 would make the most sense before counsel decides to call one  
7 or all of you when each of you have given your narrative  
8 summary of your role or involvement.

9 So with that, unless you need more direction from  
10 the Court, you may proceed.

11 **ROBIN WILSON**

12 THE WITNESS: Okay, thank you, Your Honor.

13 I am a psychologist by trade. I received my Ph.D.  
14 in psychology from the University of Toronto in 1996. I  
15 have been continuously licensed as a psychologist since  
16 1997, first in the province of Ontario, and then in the  
17 State of Florida.

18 I'm also Board Certified as a clinical  
19 psychologist by the American Board of Professional -- the  
20 American Board of Professional Psychology. I am now  
21 employed by myself as a private practitioner. My most  
22 recent employer from July of 2007 until June of 2011 was the  
23 Florida Civil Commitment Center where I was employed as the  
24 institution's Clinical Director.

25 Before I go into an overview of what the Rule 706

1 experts have been doing, I want to make it clear to the  
2 Court that we are a team. And that we have approached our  
3 duties as a team. And that we speak with one voice. That  
4 we do things by full consensus. And that although each of  
5 us may have had somewhat different aspects in each of the  
6 two cases that we're speaking to today, that in the end, we  
7 speak with one voice.

8 We were each approached in the fall of 2013 as to  
9 whether or not we would agree to be put forward as potential  
10 experts for this panel. On December the 6th, you issued an  
11 Order, Your Honor, that actually appointed us to this panel.  
12 We met with you and with Judge Keyes on January 22nd, to be  
13 given some general idea about what expectations were of us.  
14 And then on the 20th of February, 2014, the Court issued an  
15 order in which there were some very specific issues that we  
16 were asked to explore.

17 THE HONORABLE JUDGE FRANK: Would it be accurate  
18 for us to say that we saw your input, and then that Order  
19 that you've just referenced incorporates the discussion that  
20 we had earlier? In other words, the Order that followed  
21 that get-together to make sure that we got into the Order.  
22 So, in other words, what discussions were there, then it  
23 showed up in that Court Order that now, of course, is  
24 public?

25 THE WITNESS: Yes, sir. And the two major

1 components were that we were to do an entire evaluation of  
2 the entire program. And you also asked us to evaluate  
3 individual cases, and that you asked us to focus at first on  
4 certain subcategories within the Class, those being -- those  
5 being the residents of the MSOP who have no adult  
6 convictions, who have severe and persistent mental illness,  
7 who have intellectual or other cognitive limitations, and  
8 those who were elderly and perhaps were experiencing some  
9 symptoms of age.

10 In -- I'm just getting my time frame straight.  
11 So, in the week of March 31st, we met as a team. With the  
12 exception of Dr. Miner who had a previous engagement, we  
13 traveled to the St. Peter Facility to begin our process. We  
14 had a tour of the facility at first. And I should note, we  
15 had a large amount of documentation that we asked for that  
16 was provided by the State so that we could review those  
17 documents prior to going to the St. Peter Facility.

18 Once at the St. Peter facility, as I said, we had  
19 a tour of most of the facility, during which time we were  
20 able to see the conditions of confinement, to see what sort  
21 of options were there for leisure or occupational stuff. We  
22 saw some of the group rooms, some of the residents also  
23 allowed us to inspect their rooms to see what sort of, what  
24 sort of quarters they had.

25 We also had an opportunity to meet with the

1 administrative staff to ask some questions and to ask of  
2 them for lists of certain types of people who were being  
3 held at the St. Peter facility. And we also, in advance of  
4 our going to Moose Lake, asked for some lists of certain  
5 types of people who were being held at the Moose Lake  
6 facility, as well.

7 During our tour, we had incidental contact with  
8 some of the residents. We were able to ask them certain  
9 questions in a more sort of ad hoc sort of framework. Once  
10 we got the lists from the administration, we were able to  
11 start to identify some people we might want to interview,  
12 and that process was generally one of first going through  
13 the file material.

14 And our process has been this. We essentially  
15 divvied up the lists such that each of us would look at a  
16 subset of that total list, and then in any circumstance  
17 where we believed that a case merited some further  
18 evaluation, that case was passed on to a second member of  
19 our team.

20 If both of the members of the team believed that  
21 this was something that needed further evaluation still,  
22 then we asked to do an interview with the client. And based  
23 on that interview, we then decided whether or not we would  
24 speak to staff, as well.

25 During our time at the St. Peter Facility, we

1 became aware of one female, and we were immediately  
2 interested to do further evaluation on her. I won't speak  
3 generally to that, one of my friends will do so.

4 So, we were there from March 31st until April 3rd,  
5 I believe. Following that meeting, we had a conference call  
6 with the Court to provide some feedback as to our initial  
7 findings. On that basis, the Court asked us to consider  
8 whether we would identify what the Court referred to as  
9 bellwether cases, those being cases where there was an  
10 individual where the Court may be able, where the Court  
11 might be able to make some motions in advance of the full  
12 processing of this proceedings.

13 We spent some time with Ms. Bailey. We were able  
14 to interview her with the exception of actually Dr. Miner  
15 who was not on site. We as a group then proceeded to write  
16 a report on her, which we did not file until later.

17 On -- between April -- from April 28th to May 1st,  
18 we made a trip to the Moose Lake facility, and we engaged in  
19 more or less the same process. We were able to go through  
20 file materials, most of these being through the Phoenix  
21 Online system. And in that process we were looking at those  
22 groups that I spoke about before, those -- most  
23 specifically, we were looking at those individuals who had  
24 no adult convictions.

25 During our tour of the Moose Lake Facility, we had

1 incidental contact with a number of the residents. In the  
2 course of that process, we were introduced to Mr. Terhaar.  
3 After having spoken with him, we decided that he was one of  
4 the ones that we would look further into with respect to his  
5 file material, and then we also interviewed him and members  
6 of his clinical team.

7 During our time at Moose Lake, we also interviewed  
8 a number of different staff members. We tried to have a  
9 broad, broad representation of the sorts of staff who are at  
10 the Moose Lake Facility, so we spoke to, we spoke to some of  
11 the clinical administrative staff, some of the actual  
12 clinicians, themselves. We spoke to some of the security  
13 staff, and as I said we had a tour of, I think, pretty much  
14 most of the facility.

15 We also had time to walk around to several of the  
16 dorms or the units, whatever they're called, and to, again,  
17 have some incidental contact with a number of the actual  
18 residents of the Moose Lake Facility.

19 So, we -- through that process, we saw a number of  
20 people who are reasonably similar to Mr. Terhaar, and  
21 there's no particular rhyme or reason as to why we wrote the  
22 report on him first. We anticipate submitting further  
23 reports on other members of the Class who are in a similar  
24 position to him. So, it would be unfair to suggest that we  
25 just kind of singled him out. He just happens to be the

1 first person that we have written a report on. We  
2 anticipate filing similar reports on people who are in more  
3 or less the same both.

4 So we filed our report on Mr. Terhaar on May the  
5 18th, and we filed a report on Ms. Bailey on June the 4th.  
6 We met with the Court on June 9th to speak further about our  
7 process, and then following that meeting we traveled to  
8 Moose Lake for further interviews and further work of the  
9 same sort that I have already mentioned.

10 The evaluation of the entire process that is in  
11 place at the MSOP, the sort of problematic aspects is a very  
12 large task. We are in the process of preparing a report  
13 that will speak to the issues that surround kind of  
14 conditions of confinement, the sort of treatment being  
15 offered, instant opportunities for various programming for  
16 various programmatic openings and also aspects of the  
17 process for potential release. That is not necessarily  
18 everything, but we will file a comprehensive report which we  
19 anticipate to file with the Court by the end of August.

20 So, it's not that we've spent our time there, you  
21 know, looking at individual cases. That has been part of  
22 our process, but the other aspect of our process is to learn  
23 as much about the MSOP as we can so that we can file a  
24 comprehensive report that speaks to those larger issues.  
25 And as I said, we anticipate filing that with the Court by

1 the end of August.

2 With respect to individual reports on other  
3 members of the Class where we believe there are issues with  
4 their confinement, we anticipate filing further reports  
5 probably within the same time frame.

6 So, at this point, we see our task as being  
7 twofold, as was set out in the Order from the Court on the  
8 23rd of February. One is to do a program evaluation of the  
9 entire MSOP, which we are engaging in and which we continue  
10 to do. We will be at the St. Peter Facility in the first  
11 week of August to continue that process. And as I said, we  
12 anticipate filing that report with the Court by the end of  
13 August.

14 We also continue to review individual cases to  
15 identify whether or not there are people in similar  
16 circumstances to Mr. Terhaar or to Ms. Bailey. And again, I  
17 won't speak specifically to either one of those two cases,  
18 that will be the task of one of my colleagues.

19 So, at this point, that's a general overview of  
20 what we've been doing as team. But I do want to emphasize  
21 once again that we are a team, and that we speak with one  
22 voice, and that we have been working very closely together  
23 with one another.

24 THE HONORABLE JUDGE FRANK: All right. Obviously  
25 it is your right to have one or both attorneys return you to



1 the stand, you may step down.

2 THE WITNESS: Thank you Your Honor.

3 (Witness stepped down.)

4 THE HONORABLE JUDGE FRANK: We'll now call upon  
5 Dr. Mike Miner.

6 (Witness sworn.)

7 THE HONORABLE JUDGE FRANK: There is a step up  
8 there, if you would, please state your full name and spell  
9 your last name, please, for the record.

10 THE WITNESS: Michael Miner, M-i-n-e-r.

11 THE HONORABLE JUDGE FRANK: I think you were here  
12 when I suggested to your colleague kind of how to go forward  
13 with your narrative summary, so unless you have questions  
14 for the Court, you can proceed.

15 **MICHAEL MINER**

16 THE WITNESS: All right. So I received my Ph.D.  
17 from St. Louis University in 1984. And joined the staff of  
18 California Sex Offender Treatment and Evaluation Project in  
19 1986 as their on-site Head of Research. I've been at the  
20 University of Minnesota now since 1992. I am a professor.  
21 I'm in the Program in Human Sexuality, which is part of the  
22 Department of Family Medicine and Community Health.

23 Since joining the staff at the Program in Human  
24 Sexuality, I have been involved in outpatient sex offender  
25 treatment, doing a variety of assessment tasks for a range

1 of issues pertaining to sex offender assessment and  
2 management. And I conduct research into risk assessment,  
3 predictors of sexual abusive behavior in adolescent males,  
4 and hypersexual behavior. My research is federally funded,  
5 starting with the Office of Juvenile Justice and Delinquency  
6 Prevention, National Institute of Justice and the National  
7 Institute of Mental Health.

8 So, I'm going to kind of -- I want to reiterate  
9 what Dr. Wilson said, and that is that we as a group have  
10 reviewed all of the records, have worked together to develop  
11 and write the reports that are submitted, and we do speak as  
12 one voice. I'm going to hit some just kind of basic issues  
13 around juvenile sex offender risk of juvenile sex offenders  
14 and the idea of sexually reactive children.

15 The reason I'm doing this is that as we look at  
16 various reports, we acknowledge that the group of residents  
17 who have no adult crimes and whose behavior was simply where  
18 it was all as juveniles, they're a very specific group of  
19 individuals. And they present a very specific set of  
20 issues, issues and challenges in terms of risk assessment  
21 and in terms of treatment.

22 We know a few things, and there are two different  
23 groups here that are really important to understand, and one  
24 is the concept of the sexually reactive child, which is the  
25 prepubescent or 10 to, you know, prepubescent individual

1 under 12 years old. And what we've learned from research by  
2 Mark Chaffin and others is that they're very unlikely to go  
3 on and commit adult crimes, and also that interventions need  
4 to be ecological. They need to focus on the entire  
5 constellation, and they should not necessarily be specific  
6 to sexual behavior or what we are classically calling sex  
7 offender treatment.

8 When we talk about adolescent sex offenders,  
9 again, one of the interesting pieces of research is that in  
10 general, having committed a sexual crime as an adolescent  
11 does not predict whether or not one will commit a sexual  
12 crime as an adult. In fact, in most studies, adolescent sex  
13 offenders are no more likely to go on to commit sexual  
14 offenses as an adult than any another kind of delinquent.  
15 What seems to be predictive is the number of adjudications  
16 for delinquency that take place.

17 Research, ongoing research indicates that there  
18 are more similarities between kids who commit sex crimes  
19 than kids who commit other types of criminal behavior. And  
20 we know from Moffitt's research and other longitudinal  
21 studies that in general, adolescents desist, and that the  
22 prime age group for delinquent behavior is between about 15  
23 and 17, and after that, the behavior tends to dissipate.

24 And that presents a very particular problem in  
25 using adult assessment procedures with individuals whose

1 behavior took place in childhood and adolescence. Because  
2 one of the rely interesting aspects of that is in an adult  
3 assessment, if you're under 25, you are more at risk to  
4 re-offend. In an adolescent offender, as you age from 16  
5 through 18 through 25, your risk for re-offending actually  
6 decreases. And so there is a very -- there's a reciprocal  
7 aspect of risk in terms of age, depending on whether your  
8 behavior took place in childhood or adolescence, or whether  
9 your behavior took place in adulthood or whether it happened  
10 in both places. And that's particularly important as we  
11 look at especially Mr. Terhaar's case. But, also, when we  
12 talk about sexually reactive children, that's really  
13 important as we look at Ms. Bailey.

14 The other aspect here is treatment, and speaking  
15 to what's appropriate treatment for an individual whose  
16 behavior is problematic, but rather not particularly  
17 inappropriate for age. And again, as the field has matured,  
18 what the research is showing and what appears to be the most  
19 effective is to look at things from a much more ecological  
20 perspective, and that what we are specifically calling sex  
21 offender treatment is less effective apparently, or  
22 certainly the field working with juveniles is moving away  
23 from "sex offenders specific treatment" to more  
24 ecologically-based treatment like multisystemic therapy.  
25 And all of that kind of bears on what is appropriate in the

1 situations that we're addressing here. I will defer to my  
2 colleagues for the specifics of the two cases, and I think  
3 that's as far as I need to go.

4 THE HONORABLE JUDGE FRANK: All right. Subject,  
5 again, to one or both counsel calling you, please have a  
6 seat, and we will move on to Dr. Naomi Freeman.

7 (Witness stepped down.)

8 (Witness sworn.)

9 THE HONORABLE JUDGE FRANK: There is a step up as  
10 you probably heard me say, there. And once you're situated  
11 there, if you'd state your full name and spell your last  
12 name, please?

13 THE WITNESS: My full name is Naomi Freeman, last  
14 name is F-r-e-e-m-a-n.

15 THE HONORABLE JUDGE FRANK: And unless you need  
16 further direction from me in light of, you've been here, as  
17 I have explained how we'd begin with each of your  
18 colleagues, you may proceed.

19 **NAOMI FREEMAN**

20 THE WITNESS: Thank you. I received a Ph.D. from  
21 the University of Albany in 2008. My current position is  
22 I'm Deputy Director for the New York State Office of Mental  
23 Health, the Division of Forensic Services. In that  
24 capacity, I manage, direct, oversee all mental health  
25 services for any justice-involved individual. That includes

1 the New York State Sex Offender Civil Management Program.

2 We are charged with both the implementation and operation of  
3 the full program in New York State.

4 I'm going to talk briefly about our summary that  
5 we wrote regarding Mr. Eric Terhaar. As has been reported  
6 in both the records and the documents that were filed for  
7 today's proceeding, Mr. Terhaar does not have any  
8 convictions as an adult. His offenses occurred between the  
9 ages of 10 and 14 years old. There are also some additional  
10 allegations in the records about incidences that might have  
11 occurred between the ages of 14 and 17.

12 Mr. Terhaar has displayed numerous behavioral  
13 problems during his adolescence and he was in numerous  
14 different juvenile facilities and placements throughout his  
15 childhood. Within those programs, he participated in a  
16 number of sex offender treatment programs, those  
17 comprehensively at the Mille Lacs Academy between 2005 and  
18 2006. At that time, he did write a full sexual history and  
19 a relapse prevention plan.

20 He also participated and passed a polygraph  
21 examination. And a treatment staff at the end of 2006 felt  
22 that his discharge was needed, as at that time they felt  
23 they were warehousing him, and that he should be released to  
24 the community so that he could gain some real world  
25 experiences. At that time, he did address 15 of the

1 treatment goals as well as eight of his victimization goals.

2 In 2009 at the age of 19, Mr. Terhaar stipulated  
3 to civil confinement at MSOP. So, after reviewing numerous  
4 records as Robin said, as well as interviewing him on April  
5 30th, the panel unanimously agrees that he needs to be  
6 unconditionally discharged from MSOP.

7 He has file records and file material to indicate  
8 that he demonstrates an ability to control his sexual  
9 impulses. He has developed skills to curb his anger, as  
10 well as effectively manage his emotions. He has normal age  
11 appropriate sexual interests, and he has gained insight into  
12 his offending, as well as some of the trauma in which he  
13 experienced as a youth. As such, we believe that he needs  
14 to be unconditionally discharged from MSOP.

15 I'd like to also point out that the panel does not  
16 support the movement to CPS as recommended by MSOP -- excuse  
17 me. Rather, the panel believes that the life skills, the  
18 case management, the outpatient treatment services that  
19 Mr. Terhaar needs in order to adjust and reintegrate back to  
20 the community would be better received in the community by  
21 local services similar to any citizen or young adult would  
22 receive in the community. We also believe that those  
23 services would be better received provided by local supports  
24 than in CPS.

25 Now I'm going to switch gears a little bit and

1 speak to the research regarding female sex offenders. What  
2 I didn't mention when I discussed by education and  
3 experience is that I have published with regards to the  
4 effectiveness of sex offender public policies, as well as  
5 female sex offenders.

6 So what we know about women who engage in sex  
7 offending is that they appear to constitute about 5 percent  
8 of all sexual offenses. That when you look at the  
9 recidivism research, the five-year recidivism rate for males  
10 is roughly 10 to 15 percent, whereas the five-year  
11 recidivism rate for females is anywhere between 1 percent  
12 and 3 percent. This discrepancy in the rates is not unique  
13 just to sex offending. And in fact, we see that in the  
14 research with regards to female general offenders, as well  
15 as male general offenders.

16 Research has also known that most female sex  
17 offenders suffer from high rates of childhood sexual abuse  
18 and trauma. And, in fact, these rates are even higher when  
19 you compare female sex offenders to female general  
20 offenders. Because of this, their offenses tend to be  
21 driven by different factors than male sex offenders, and  
22 their interventions require different approaches and  
23 different treatment approaches than males, and in fact, they  
24 need to be gender specific to deal with the issues these  
25 women have experienced.



1 Risk measures designed for male sex offenders are  
2 also not appropriate for female sex offenders. That is  
3 because the risk factors with regard to female sex offenders  
4 are different. It's also because the instruments -- two  
5 reasons, the instruments were validated with the female  
6 sample, nor do they theoretically or conceptually make  
7 sense.

8 So, for example, in the male instruments, the  
9 Static-99, for example, living with an intimate partner is  
10 actually considered somewhat of a protective factor for  
11 adult male sex offenders, whereas there is some theoretical  
12 thought that for females, this could actually be a risk  
13 factor given that many females actually engage in sexual  
14 offending with their co-accomplice who's often a male in  
15 some type of coercive environment.

16 Another example would be with regards to having a  
17 male victim. This is a risk factor for males, as it might  
18 show a tendency toward sexual deviance, it would not be a  
19 risk factor for females.

20 So, overall, the literature shows that relative to  
21 male sex offenders, the female recidivism rate is  
22 significantly lower, and that they do require very different  
23 gender specific interventions and treatment approaches.

24 And I'm going to turn it over to my colleague.

25 THE HONORABLE JUDGE FRANK: Thank you.

1 I will now call upon Ms. Deborah McCulloch.

2 (Witness sworn.)

3 THE HONORABLE JUDGE FRANK: As you probably heard  
4 me say, there is a step up there.

5 If you would please state your full name, spell  
6 your last name.

7 THE WITNESS: Deborah Jean McCulloch,  
8 M-c-C-u-l-l-o-c-h.

9 THE HONORABLE JUDGE FRANK: And unless you need me  
10 to repeat or go through some of the directions of any of  
11 your colleagues, you can proceed.

12 **DEBORAH McCULLOCH**

13 THE WITNESS: All right. I received my Master's  
14 Degree in Social Work from the University of Wisconsin,  
15 Madison in 1992. I also hold a Certificate in Women's  
16 Studies and in Criminal Justice from the University of  
17 Wisconsin, Madison.

18 I've been licensed as a clinical social worker in  
19 Wisconsin since 1994. My career has really -- well, been  
20 focused on forensic mental health. I have worked at both  
21 state hospitals in the State of Wisconsin in the forensic  
22 programs as a clinician, as a manager and as a deputy  
23 director of one of the facilities.

24 Since 1999, I have been involved with Wisconsin's  
25 Sexually Violent Persons Law which passed in 1994, including

1 developing and implementing release plans. I am currently  
2 the Director of Wisconsin's SVP Program, which includes  
3 research, evaluation, court evaluation, inpatient and  
4 outpatient treatment, medical treatment, the statewide  
5 supervised release program and discharge.

6 We have a current population of about 400 SVPs in  
7 Wisconsin, which have included over 100 discharges and over  
8 100 supervised releases.

9 So, I'll talk a bit about Ms. Bailey. In April,  
10 Drs. Freeman, myself and Dr. Wilson visited the St. Peter  
11 Campus, and we were very surprised to learn that there was a  
12 sole female at St. Peter on a male unit in male treatment  
13 groups. And we decided at that time that we needed to look  
14 into that a bit further.

15 I wanted to add also to what Dr. Wilson stated,  
16 and that is, prior to both of our visits at St. Peter and at  
17 Moose Lake, various members of our team met with the  
18 ombudsman's office at both facilities.

19 So, we did a brief record review when we were at  
20 St. Peter, and we made the mistake of asking for  
21 Ms. Bailey's entire record, which came on a skid. We have  
22 not reviewed her entire record. She's been committed since  
23 1993 and her records are extensive.

24 We were struck by her traumatic history. We were  
25 struck by her comprehensive diagnosis, including many

1 paraphilias, which is surprising given that she's a woman  
2 and having numerous paraphilias.

3 THE HONORABLE MAGISTRATE JUDGE KEYES: Would you  
4 define that diagnoses, please?

5 THE WITNESS: Diagnoses including -- I have to  
6 think about which diagnosis. I don't have them written down  
7 here; but, yes, deviant sexual arousal to children, to  
8 violence, those kinds of things refer to paraphilias.

9 We interviewed Ms. Bailey and others at St. Peter  
10 when we visited. We were also struck by the reactive nature  
11 of her offending. We discussed further as a team, included  
12 Dr. Miner in our discussion, that we would look further at  
13 Ms. Bailey's case.

14 We did an extensive record review. Again, we did  
15 not read the entire record, reviewed the research related to  
16 female sex offenders, drafted a report relative to our  
17 findings. And as Dr. Wilson stated, by consensus we  
18 reviewed, revised and submitted that report, recommending  
19 that Ms. Bailey be transferred from her current situation,  
20 and to consider provisional discharge.

21 We also interviewed Dr. Beth Johnson who was the  
22 psychiatrist at the time, and we interviewed her by video  
23 conference. I did want to point out that on page 4 of our  
24 report that we submitted, there is one correction. That  
25 there is a reference that the MSOP or when she was at the

1 state hospital, there were numerous references to  
2 specialized treatment, needing specialized treatment,  
3 needing medications to address her hypersexuality. And  
4 there were references to Depo-Provera. That was never  
5 started according to my record review, and there's a  
6 reference that it had been started.

7 So, contrary to standard practice and across the  
8 field, we made a unanimous recommendation, standard practice  
9 meaning that women and men are separate, they have separate  
10 living conditions. While there are co-ed situations, those  
11 co-ed situations don't include one woman and the rest are  
12 men, and this is found in prisons, the military, college  
13 campuses, camps, et cetera. So we were struck by the fact  
14 that Ms. Bailey was the sole woman in a large program of all  
15 men. And that from our perspective, that was contrary to  
16 the standard of practice.

17 We questioned her meeting the criteria for  
18 commitment, given the research about risk for re-offense;  
19 however, we did not recommend complete discharge, we  
20 recommended that provisional discharge be considered.

21 From our perspective, we believe that Ms. Bailey's  
22 condition is negatively affected by her placement at the  
23 MSOP, that the treatment for female sex offenders -- again,  
24 there's not a lot of literature; however, the field in  
25 general, including female offenders, is really focusing on

1 psychological functioning rather than focusing on sex  
2 offending or sex offender-specific treatment.

3 So, that would include addressing psychiatric  
4 issues, trauma issues, healthy sexuality, developing  
5 relationships and boundaries, and then also addressing  
6 general criminality. And these are areas that we believe  
7 could be addressed in a community-based facility or setting.

8 We also recommend supportive services. So, there  
9 are three areas that we believe that should be addressed  
10 relative to a transfer of Ms. Bailey. Again, the  
11 psychological functioning of Ms. Bailey, the general  
12 criminality and supportive services.

13 We also agree that the situation about placement  
14 is very complex, both Drs. Freeman and myself have extensive  
15 experience in placing and developing placements for  
16 high-risk offenders, whether they're sex offenders or  
17 high-risk offenders who have otherwise committed offenses  
18 and are -- either the community reaction or political  
19 reaction to their placement. And we believe that that can  
20 occur. And from our experience, sometimes that includes  
21 developing the services rather than seeking out existing  
22 services, but developing the services to meet that person's  
23 need. And that's all.

24 THE HONORABLE JUDGE FRANK: Subject to the right  
25 of each attorney to call you, thank you.

1 My suggestion to Counsel, absent, you know,  
2 something I may be unaware of, is this may be a logical  
3 place to take a noon break of say an hour and 15 minutes,  
4 that will give people a chance that are returning to leave  
5 the building and come back if they wish for noontime lunch.

6 Would that be acceptable to the Plaintiffs?

7 MR. GUSTAFSON: Of course, Your Honor.

8 THE HONORABLE JUDGE FRANK: For the Defendants?

9 MR. BRENNAMAN: Of course, Your Honor.

10 THE HONORABLE JUDGE FRANK: Then for anybody in  
11 the courtroom that didn't hear, we'll stand in recess until  
12 1:15. And it was our intent, then, that the Respondents or  
13 Defendants would then begin with the initial inquiry of one  
14 or all of the 706 experts, or do you call them -- and  
15 whether that's in the classic sense of direct or  
16 cross-examination, will be up to each respective counsel.  
17 And then you would follow up, Mr. Gustafson, absent an  
18 objection from either one of you. That order of inquiry?

19 MR. GUSTAFSON: Fine by me.

20 MR. BRENNAMAN: Yes, Your Honor.

21 THE HONORABLE JUDGE FRANK: All right. So we will  
22 stand in recess until 1:15.

23 (Noon recess.)

24 THE HONORABLE JUDGE FRANK: You may be seated.

25 You may proceed, Counsel.

1 MR. BRENNAMAN: Thank you, Your Honor. The  
2 Defendants call Dr. Robin Wilson to the stand.

3 THE HONORABLE JUDGE FRANK: I just remind you,  
4 Doctor, you remain under oath, so if you'd please take the  
5 stand?

6 THE WITNESS: Yes, sir.

7 **ROBIN WILSON**

8 **CROSS-EXAMINATION**

9 **BY MR. BRENNAMAN:**

10 Q. Good afternoon, Dr. Wilson. I am Nate Brennaman, again.  
11 I work at the Attorney General's Office. I am here on  
12 behalf of the Karsjens Defendants.

13 A. Okay.

14 Q. I won't ask you much about qualifications, except with  
15 regard to these reports on Mr. Terhaar and Ms. Bailey, are  
16 these the type of reports that -- have you produced reports  
17 of that type in your career as a normal course?

18 A. Not specifically within the context of a Class Action  
19 lawsuit, but certainly I've done many, many evaluations of  
20 sex offenders over my career.

21 Q. Are you a forensic evaluator?

22 A. Can you define the term?

23 Q. Well --

24 A. I think I can be a little -- I do sex offender  
25 evaluations for the State of Florida for both the Office of



1 the Public Attorney -- or sorry -- of the Public Defender  
2 and also the State's Attorney.

3 Q. And are you trained in using many of the typical  
4 actuarial tools --

5 A. Yes.

6 Q. -- for the evaluation of risk for sex offenders?

7 A. Yes, and I'm a certified master trainer for three of  
8 those tools.

9 Q. Thank you.

10 I'd like to ask you more questions about the  
11 process which was your testimony when we first began.

12 It sounds like you met with the Judges on about  
13 January 22nd, is that right? I think that's what you said.

14 A. I can't tell you precisely.

15 Yes, we met with the judges on the 22nd of  
16 January.

17 Q. Who was at that meeting?

18 A. The four of us, Mr. Ferleger, both of the judges, and --  
19 I'm sorry, I don't know the names of some of the other  
20 people, but they're here in the courtroom.

21 Q. Court staff, to --

22 A. Yes.

23 Q. -- your knowledge?

24 A. And I believe some, some of Judge Frank's staff.

25 Q. Were any of the parties to the case or their attorneys

1 present?

2 A. No.

3 Q. And what was discussed at that meeting?

4 A. We talked mostly about procedure. We've had a number of  
5 questions of the Judges in terms of being able to understand  
6 what their expectations were of us to make sure that we were  
7 responding to the Court's issues, and mostly kind of  
8 clarification stuff.

9 Q. And I think your testimony was that the contents of that  
10 discussion were memorialized in the February 20th Order that  
11 the Court issued, is that a correct recreation of your  
12 testimony?

13 A. From the January 22nd meeting, yes.

14 Q. Was it in the January 22nd meeting that the courts used  
15 this term, bellwether individual?

16 A. I don't remember whether it was specifically that  
17 meeting or a subsequent one.

18 Q. And the subsequent one would have been -- I believe you  
19 said there was a meeting in early April after you visited  
20 the MSOP St. Peter Site, is that correct?

21 A. Yes. Actually, we had a conference call with the Judges  
22 on April the 7th, and I believe that topic came up at that  
23 time -- excuse me.

24 Q. And who was on the phone in that conference call, to  
25 your knowledge?

1 A. The four of us, I believe Mr. Ferleger was there, but  
2 I'm not positive of that, and both Judges Frank and Keyes.

3 Q. Okay. And what was discussed during that meeting?

4 A. We gave an update on our meeting to St. Peter. We  
5 wanted to inform the Judges what we had seen so far, to  
6 highlight some of the issues that we were -- some of the  
7 issues that were emerging, and also to get some further  
8 clarification about how extensive they wanted us to be in  
9 our reviews of the individual cases.

10 Q. Were any of the parties or the parties' attorneys on  
11 that conference call?

12 A. No, no.

13 Q. And was it on that conference call, then, that they  
14 spoke to you of this term, bellwether individual?

15 A. I believe so, yes.

16 Q. What did you understand to be the instruction? What  
17 does that term encapsulate or mean?

18 A. We actually spent a lot of time getting clarification  
19 from Judge Frank at that point. What Judge Frank had asked  
20 us to do is to, within these certain subgroups of people  
21 that he asked us to focus on first, he wondered whether or  
22 not there were any specific individuals that we might --  
23 that we might ascertain would merit some further  
24 investigation or might actually be someone that could be  
25 either recommended for release or for some sort of a change

1 in circumstances.

2 Q. Besides release and change in circumstances, what did  
3 you believe was your instruction from the Court in terms of  
4 finding a Bellwether individual? Were those the only two  
5 criteria, someone who was entitled to release or someone who  
6 was entitled to a change in circumstances? Or were there  
7 other criteria that you were looking for?

8 A. I don't recall that there were other specific criteria  
9 beyond that; that within these certain subgroups within the  
10 Class, the Judges were interested in whether or not there  
11 were any individual cases that might serve as an example.  
12 And that's how I think we understood the term "bellwether."

13 Q. An individual whose circumstances were such that they  
14 would serve as an example to who or for what purpose?

15 A. To the Court, as to whether or not that person could  
16 have their circumstances changed.

17 Q. Okay. So, did you interpret that instruction to be the  
18 Court wanted you to find someone that the Court could use as  
19 an example? I don't know what you mean by use as an  
20 example.

21 A. I'm sorry if I'm not being clear.

22 So, the process was that we were -- in the Order  
23 that the Judge made February 20th, there was instruction for  
24 us to essentially evaluate all of the residents of the MSOP.

25 In our discussions with the Judge outside of the

1 Order, he had asked us to focus, specifically, on certain  
2 subgroups, as I spoke to earlier. One of those subgroups  
3 was the men who had not had any adult charges.

4 And the Judge asked us whether or not within that  
5 group if we found anyone where we believed that person was  
6 being held at the MSOP and could potentially be either  
7 released to the community or could be moved to some other  
8 place. Would we be able to write a report that would sort  
9 of highlight some of those issues.

10 Q. Okay. And did you -- you undertook, then, a study of  
11 the Assisted Living Unit, the Alternative Program, and the  
12 Young Adult Program at MSOP?

13 A. Yes.

14 Q. Is that right?

15 Did you do -- and I understand there were sort of  
16 two levels of the review of these files. One was sort of a  
17 cursory review to see if there was an indicia of problems,  
18 is that --

19 A. Yes.

20 Q. -- correct to say?

21 A. Yes.

22 Q. And then if there were indicia of problems on that  
23 cursory review, I understood from the testimony of the Rule  
24 706 experts that you would do a more thorough review. And  
25 then if you felt there were problems, it would go to another

1 one of the Rule 706 experts to do a review; is that correct?

2 A. Yes.

3 Q. And did you review all of the individuals in those three  
4 programs? Again, the Young Adult Program, the Alternative  
5 Program and the Assisted Living Unit?

6 A. We have not completed our review of all of those members  
7 at this point.

8 Q. Okay. Can you give me a sense of how far along you are?  
9 Let's take the Young Adult Unit, first. How many people are  
10 in that Unit, do you know?

11 A. I couldn't give you an exact off the top of my head. My  
12 guess is that we've seen between 15 to 20 members of that  
13 group in an actual interview. In terms of reviewing their  
14 files, I believe we've done a cursory review of most or all  
15 of them.

16 Q. And how many at this point are going to get that second  
17 level of review?

18 A. I believe once that we've actually started that process  
19 on, probably about six or eight.

20 Q. In the Alternative Program, do you have any idea how  
21 many individuals are in that program?

22 A. Not off the top of my head, no.

23 Q. Would it surprise you if I told you that there were  
24 approximately 120 individuals in that program?

25 A. It would not.

1 Q. Okay. How many do you think that you've done a cursory  
2 review of? And I mean by "you," you know, among the --

3 A. Speaking --

4 Q. -- four of the team --

5 A. -- about me, or the whole team?

6 At this point, not very many. We've not gotten to  
7 that point yet. We're still pretty early in our process of  
8 reviewing cases.

9 Q. So, a dozen? A few dozen?

10 A. Perhaps a dozen.

11 Q. How about the Assisted Living Unit?

12 A. Probably about the same.

13 Q. And approximately, do you know how many people are in  
14 the Assisted Living Unit?

15 A. Not off the top of my head, no.

16 Q. If I said 25, would that surprise you?

17 A. No.

18 Q. Does that sound about right?

19 A. Sure, yes.

20 Q. The way the process you've described is structured, is  
21 it possible for you to write a report on an individual who  
22 is in the correct placement and receiving the correct  
23 treatment at MSOP?

24 A. Yes.

25 Q. Okay, and describe to me the circumstances under which

1 that report would get written.

2 A. We review the file material. We interview the client.  
3 And we interview some members of that client's clinical  
4 team.

5 Q. But if I understand your testimony correctly,  
6 Dr. Wilson, what you just said is that you were instructed  
7 by the Court to review files to find problems with either  
8 placement or commitment, period. And so, if someone is  
9 placed in the right place and is receiving the correct  
10 treatment, isn't it true that you would do a cursory look at  
11 that file and then put it aside and move to the next file in  
12 order to -- because you're looking for ones for which there  
13 are a problem?

14 A. Yes.

15 Q. So, that is correct?

16 A. Yes.

17 Q. And so, you're not actually going to be writing any  
18 individualized reports about committed individuals at MSOP  
19 who are both in the right placement, in the right phase of  
20 treatment and receiving the proper treatment for their  
21 treatment phase; is that right?

22 A. Yes. Sorry, I may have misheard you the first time.

23 Q. In terms of the more global report that you're working  
24 on, or I don't think the word global was used -- the broader  
25 report about the program. What instruction did you receive



1 about doing that report from the Court?

2 A. The Court asked us to essentially evaluate all aspects  
3 of the MSOP.

4 Q. And so, is that report likely to cull out specific  
5 individuals? Or is that report going to talk more broadly  
6 about treatment and conditions?

7 A. It's going to talk more broadly about treatment and the  
8 conditions.

9 Q. Anything else?

10 A. It may make some commentary about the legal framework,  
11 as well.

12 Q. Anything beyond that?

13 A. Without reviewing my notes, it's hard to be fully  
14 comprehensive, but we're looking at all aspects of the MSOP.

15 Q. Is the intent to review the files of all 700 individuals  
16 prior to completing that more comprehensive report?

17 A. I don't believe we'll be able to have done that.

18 Q. How many do you think that you'll be able to review?

19 A. To have reviewed the files, even at the so-called  
20 cursory level, my guess is that we will not have been  
21 through more than about 25 percent of the full population of  
22 the MSOP.

23 Q. How much longer does it take to do a more in-depth  
24 review than it does a cursory review? So, for instance,  
25 what do you look at when you do a cursory review of a file?

1 A. We're looking at the reports that were used to civilly  
2 commit them in the first place. We look at the  
3 individualized treatment plans as the individual has moved  
4 forward throughout the program. We look at the -- if there  
5 are any psychiatric kinds of evaluations that have been  
6 done, all of the annuals, psychological reviews, we look at  
7 the behavior reports.

8 We're essentially looking for indications within  
9 the record of how the individual has been doing. Are they  
10 in treatment? What phase of treatment are they in? Are the  
11 treatment plans individualized to the individual needs of  
12 the client? That would be the kind of -- that would be the  
13 cursory review.

14 And in most cases, that would take us about an  
15 hour or so, an hour to an hour and a half. And if there  
16 were indications within the material that we had reviewed at  
17 that level, that the individual might require some further  
18 investigation, then we would go through the file more  
19 intensively. And if the individual who had done that  
20 process was of a mind that this is someone who may be, who  
21 may be inappropriately placed or being inappropriately  
22 treated, then we would pass the file on to one of the other  
23 members of the team for them to engage in a similar process.  
24 Q. So, if the cursory process takes an hour, how much more  
25 time do you think the in-depth process takes for the

1 person -- let's say for now, for the person who did the  
2 cursory review, how much more time do you spend on the file  
3 to do the more in-depth review?

4 A. I can't speak to the other members of my team, but for  
5 myself, I would say that that file review would take more in  
6 the neighborhood of about three to four hours.

7 Q. How much time have you been spending as a Rule 706  
8 expert on those -- you know, give me a comparison. How much  
9 percentage of your time have you spent on the cursory  
10 reviews and how much time have you spent on the in-depth  
11 reviews?

12 A. We've front-loaded it with the cursory reviews so as to  
13 be able to get through more of the files. The in-depth  
14 reviews, because they take so much more time, those have not  
15 been the principal focus.

16 The principal focus has been to try to get through  
17 as many of the cases as possible.

18 Q. Can you ballpark it for me in terms of the amount of  
19 time you've spent on the cursory reviews versus the in-depth  
20 reviews? Is it 50/50, you think, at this point  
21 understanding that you've front-loaded it with the cursory  
22 reviews? Give me a sense of that, if you would.

23 A. Well, in our time on site, I think it would probably be  
24 reasonable to say that we've spent half of our time looking  
25 at file materials and half of our time interviewing staff

1 and sort of -- and observing aspects of the actual program,  
2 like the dorms, the food service, medical areas, things like  
3 that.

4 In terms of how much time we've spent doing file  
5 review, as opposed to the in-depth review, I'd say probably  
6 75 percent of our time has been doing cursory reviews and  
7 about one-quarter of the time doing the more intensive  
8 reviews.

9 Q. For the cursory reviews, just so I am understanding it  
10 correctly, you only looked at certain individuals within the  
11 Young Adult, Alternative Program, and Assisted Living Units,  
12 right? You haven't looked, even at a cursory level, at  
13 individuals who live outside of any of those units, is that  
14 right?

15 A. No, we have not.

16 Q. You have not done a review of those other people?

17 A. No, we've been focusing on the areas the Judge asked us  
18 to look at first.

19 Q. So just so I'm understanding, you've gotten through 15  
20 to 20 people in the Young Adult Program, about a dozen in  
21 the Alternative Program, and about a dozen or so in the  
22 Assisted Living Program?

23 A. I think I said that we've been through the files on a  
24 cursory level for, I believe, almost all of the young adult  
25 folks, and that the other two groups, much less at this

1 point.

2 Q. How many young adults do you believe you'd be writing  
3 reports on?

4 A. I'm not sure.

5 Q. Less than ten?

6 A. Probably more than ten would be my guess.

7 Q. And these -- the reports you have on -- and so when  
8 you're doing, then, your comprehensive report, I mean, what  
9 do you hope to achieve? At the time you write that report,  
10 what do the experts want to have looked at and spent most of  
11 their time on? Are you going to do more cursory reviews or  
12 are you going to do more in-depth reviews? Tell me sort of  
13 what goes into the writing of that report and what you are  
14 hoping to achieve, to have looked at at that point in time.

15 A. In going through all of the members or in going through  
16 all of the members of the Class, regardless of which subset  
17 they fit into, it's my expectation that the majority of our  
18 reviews will be of the cursory type.

19 Q. And why wouldn't you go into more depth on an individual  
20 who is correctly placed? Is that just not the instruction  
21 you've been given?

22 A. That's not the instruction we've been given.

23 Q. You mentioned that you also met with the Court on June  
24 9th. Was that a face-to-face meeting or a telephone  
25 meeting?

1 A. Face-to-face.

2 Q. And who was at that meeting?

3 A. Both of the Judges, the four of us, Mr. Ferleger and  
4 some of the Court staff.

5 Q. Were any of the parties or parties' attorneys at that  
6 meeting?

7 A. No.

8 Q. And what did you discuss at that meeting?

9 A. We talked about the two reports that we had filed, the  
10 report for Ms. Bailey, and the one for Mr. -- for  
11 Mr. Terhaar. We also spoke with the Judges. We, as a  
12 group, have had some concerns about the prospect of having  
13 to review every single case file.

14 We were meeting in some respects to kind of  
15 advocate for a randomized sample so as to not be reviewing  
16 quite as many cases. I think I could speak for all four of  
17 us that we all have full-time jobs outside of this, and this  
18 is becoming a full-time job over and above that. And it's  
19 having some effects on both our professional and our  
20 personal lives. And we wanted to see whether or not there  
21 was an expedited process that we may be able to do to  
22 respond to the Court's intents, but at the same time, be  
23 able to function.

24 Q. And what did the Court tell you? Did he give you  
25 additional instruction in that regard?

1 A. At this point, I believe the judges wanted to see what  
2 would happen with the two cases that we had given them so  
3 far, and I don't believe we've had any finite instruction  
4 beyond that.

5 Q. So, take a wait-and-see approach?

6 A. Yes.

7 Q. Okay. Did you receive any other instruction from the  
8 Court at that meeting about how you were doing the reports  
9 or the timing of the reports? Did you talk at all about  
10 when the bigger report would be done?

11 A. We did speak about when the bigger report would be  
12 completed.

13 Q. Did you get any instructions from the Court on that  
14 score?

15 A. We did. They asked us to have it finished by the end of  
16 August.

17 Q. Do you think that is achievable?

18 A. I hope so. I'm the one who will write the shell of it,  
19 and then the rest of the panel will make their inputs, and I  
20 think that we should be able to do that within the  
21 timeframe.

22 Q. And again, what -- I mean, how many of the -- how many  
23 individuals' files at MSOP do you think you'll be able to  
24 look at and include them in your analysis when you do that  
25 bigger report at the end of August?

1 A. I think I've said already that probably about  
2 one-quarter of them.

3 Q. And you know you said that you're front-end --  
4 front-loading cursory reviews. But, at the end of the day  
5 when you're done with all of the reviews, let's say you do  
6 end up doing 25 percent, do you have a sense of how much  
7 time will have been spent at that point looking to the more  
8 individualized reviews on files that appear to have problems  
9 and how much time will have been spent on the cursory  
10 reviews?

11 A. I would say somewhere in the neighborhood of about  
12 three-quarters would be cursory reviews and about  
13 one-quarter would be the in-depth reviews.

14 Q. Okay.

15 A. And I think I should be clear about what I mean when I'm  
16 saying an actual cursory review. It's not that we're  
17 reviewing one or two documents on the person, and then sort  
18 of moving on to the next one. We're essentially going  
19 through enough of the file material to have a good sense of  
20 who this person is, what it is that they've done, you know,  
21 over their lifetime with respect to offending, what they've  
22 done since they've arrived at the MSOP, what phase they're  
23 in, what kind of things are they doing in treatment, and  
24 what sort of behavioral issues they may have been  
25 experienced, as well.



1 Q. Okay. And if you do that type of a review, again, and  
2 find somebody who doesn't appear to have any problems,  
3 they're in the right placement, getting the right treatment,  
4 they seem to be appropriately at MSOP and they're moving  
5 through treatment, then you put that one aside, right?

6 A. Yes.

7 Q. And then if there's any indicia of a problem, that's the  
8 one that gets the bigger of you?

9 A. Yes, that's correct.

10 Q. I note that on the May 18, 2014 report on Eric  
11 Terhaar -- that's the date on it. On that date, was that  
12 the date it was completed by the experts?

13 A. I'm not sure of that. We worked on the report probably  
14 for about two or three weeks. Because there are four of us,  
15 one person wrote the shell of the report, and then each one  
16 of us added to it, made some changes, either added things,  
17 took things away. So, between the four of us it went back  
18 and forth for, I think, probably two or three weeks. Then  
19 we finalized the report and sent it on to the Judges.

20 I don't know whether or not the last person who  
21 did anything to it did it on actually May 18th or whether it  
22 was May 15th, but --

23 Q. Do you remember, did you send the report to the Judges,  
24 then, on May 18th, or was it some other date?

25 A. I don't remember specifically who we sent it to. I

1 think we got some guidance from the Court as to where that  
2 should be sent. And I think there was some issue around  
3 making sure that all parties got it at the same time. So, I  
4 don't remember specifically who we sent it to, but it was  
5 someone that we were told to send it to.

6 Q. So, you don't -- okay.

7 So, do you remember, did you send it  
8 simultaneously to the Court and all parties?

9 A. I don't know.

10 Q. Okay. Would it surprise you to learn that the parties  
11 got it on May 30th?

12 A. No.

13 Q. Okay. But, you believe you may have gotten instructions  
14 from the Court to send it just to them?

15 A. I have some memory of the fact that it needed to go to  
16 everyone at the same time, but then again -- you know, once  
17 again, I'm not sure exactly who we sent it to. I'm not even  
18 sure that I was the one who sent it, specifically. But,  
19 where it got sent to was where we were told to send it to.

20 MR. BRENNAMAN: Can I refresh the witness'  
21 recollection of the document, Your Honor?

22 THE HONORABLE JUDGE FRANK: All right.

23 If you're not going to use the screen -- sorry.

24 MR. BRENNAMAN: Do you want a copy? I'm showing  
25 you the -- I can use the screen.

1 THE HONORABLE JUDGE FRANK: We'll dial it down,  
2 then, so that --

3 MR. BRENNAMAN: It was on, sorry.

4 Maybe it will come up and maybe it won't.

5 BY MR. BRENNAMAN:

6 Q. I've handed you the Order of Appointing Experts under  
7 Rule 706 of the Federal Rules of Evidence. This is the  
8 Order. Have you seen that document?

9 A. Yes, I have.

10 Q. You seem to recall that there was instruction at some  
11 point that the reports be sent simultaneously to the Court  
12 and the parties. I'd like you to look at paragraph 6.

13 A. Yes.

14 Q. Does that refresh your recollection about where you may  
15 have received that instruction?

16 A. Yes.

17 Q. Could you read paragraph 6 for everyone?

18 A. "Pursuant to Federal Rule of Evidence 706(b)(1), the  
19 experts shall submit their findings and recommendations to  
20 the Court and to the parties simultaneously."

21 MR. BRENNAMAN: At this point, Your Honors, I  
22 would like to object to the use of the Rule 706 experts in  
23 this case and preserve that objection for the record if I  
24 could.

25 Rule 706(b) says that "The Court must inform the

1 expert" -- I'm sorry -- "The Court must inform the expert of  
2 the expert's duties. The Court may do so in writing and  
3 have a copy filed with the clerk, or may do so orally at a  
4 conference in which the parties have an opportunity to  
5 participate."

6 And the testimony of this expert is that there  
7 have been meetings with the Court in which instructions were  
8 given by the Court to the experts and the parties were not  
9 aware of it. And the Defendants object to the use of -- to  
10 the instruction being given outside of their presence in  
11 that way, contrary to Rule 706.

12 I also object that contrary to the Court's own  
13 order in paragraph 6 of submitting findings and  
14 recommendations to the Court and the parties simultaneously,  
15 the Defendants in this case did not receive the report on  
16 Eric Terhaar until May 30th.

17 THE HONORABLE JUDGE FRANK: What, specifically,  
18 are you stating, Counsel? In other words, the directive of  
19 the parties is in the -- the directive of the Court is in  
20 the Order that reflects what the experts were to do. So,  
21 what specifically are you alleging is the prejudice to your  
22 clients?

23 MR. BRENNAMAN: Well, these -- when these experts  
24 were first appointed and the Order appointing the experts,  
25 it was by agreement of the parties. I think you remember

1 that the parties recommended experts to the Court and the  
2 Court appointed all four of the experts that were  
3 recommended.

4 And there was a discussion at that point in time  
5 about what the scope and work of the experts would be, and  
6 it had to do with issues related to Class claims, claims  
7 that were common to all Class members.

8 It sounds like there was a meeting on January  
9 22nd. And we received the Court's February 20th Order in  
10 which the direction being given to the experts became more  
11 specific to look at specific areas, and individuals within  
12 the program. I guess --

13 THE HONORABLE JUDGE FRANK: You're referring to  
14 this Order that's up here, correct?

15 MR. BRENNAMAN: This is not the February 20th  
16 Order. I believe it is the December 6, 2013 order that  
17 first appointed the Rule 706 experts.

18 THE HONORABLE JUDGE FRANK: And then the next  
19 Order set out those specific categories of individuals.

20 MR. BRENNAMAN: That's right, look at the Assisted  
21 Living Unit, the Young Adult Program, the Alternative  
22 Program and so on.

23 The Defendants' concern is that since February  
24 20th, there's been, it sounds like, at least, two meetings  
25 in which a process has been developed whereby individual

1 reviews of files are going to be done in these three  
2 programs. But, it's a program set up to only report on  
3 problems and bad placements within the program. There's  
4 never going to be a report, as I understand it, that's going  
5 to be produced which talks about the individuals who are  
6 properly placed or the correct treatment that's being given,  
7 or individuals who have been receiving good treatment.

8 The Court has instead instructed these experts to  
9 embark on a system that is designed to identify only  
10 individuals who are supportive to the Plaintiffs' case, to  
11 the extent that they are supportive to the Plaintiffs' case.

12 THE HONORABLE JUDGE FRANK: Well, there seems to  
13 be a misunderstanding of the term -- a serious  
14 misunderstanding of the term bellwether. Bellwether is a  
15 very common phrase used to -- in national class actions and  
16 in MDL cases, it's the most popular, you could look on the  
17 complex section on civil litigation. And the phrase means  
18 representative cases, because the idea is if an individual  
19 or a class isn't truly representative of the whole class,  
20 it's meaningless to all the lawyers on both sides.

21 So, we may want to ask the good doctor whether it  
22 jogs his memory when the -- whether they were so upset with  
23 what they saw, they came to us -- the word release focus --  
24 or did not come from the -- did not come from the Court,  
25 that would be contrary to bellwether. That when they saw

1 Mr. Terhaar and Ms. Bailey, they specifically raised them  
2 because the bellwether concept is representative people of  
3 the 700 consistent with the Order that we did.

4 So, if there is some other criteria about people  
5 ready for release, I'm unfamiliar with it.

6 Are you familiar with it, Judge Keyes?

7 THE HONORABLE MAGISTRATE JUDGE KEYES: No, I think  
8 that's right.

9 THE HONORABLE JUDGE FRANK: I'm unfamiliar with  
10 that criteria, because it would, number one, be contrary to  
11 the concept of bellwether. And then there might be a  
12 separate issue you've touched on, and that is the -- and  
13 maybe it'll come out this afternoon -- about how long it  
14 would take if the Bellwether or another -- the phrase is  
15 representative cases aren't used randomly selected or  
16 otherwise, but then it's hard to get representative cases  
17 that are typical of the folks in there, is the cost and the  
18 length of doing 700 people, which I believe is something  
19 that the experts may have brought to everybody's attention,  
20 as well.

21 But, that's why I raised the issue I did, because  
22 it seems to be what's being suggested is quite contrary to  
23 the overall concept of bellwether and representative cases.  
24 Because you would be correct, if there was some direction to  
25 look at people eligible for release, that wouldn't be a

1 bellwether -- would not be a bellwether, or as the phrase is  
2 used, representative case.

3 So, that's where the phrase bellwether comes from,  
4 because you may be familiar, it's commonly used in class  
5 action litigation and MDL litigation across the country, and  
6 pretty much all cases to try to save time and money for all  
7 parties on all sides of the case. And admittedly, if  
8 they're not truly representative cases, that it doesn't  
9 serve the purpose of a bellwether case. But more than  
10 people wanted to know about bellwether. And I don't know if  
11 maybe there was something else you wanted on the record for  
12 your client, I'm not certain, but --

13 MR. BRENNAMAN: No, I just wanted to preserve that  
14 objection and make sure that we -- now having heard what  
15 this process is for the first time after that testimony, the  
16 Defendants, you know, are not accepting and waiving the  
17 ability to object to it.

18 THE HONORABLE JUDGE FRANK: All right.

19 THE WITNESS: Sir, can I respond to your comments?

20 THE HONORABLE JUDGE FRANK: Oh, sure.

21 THE WITNESS: It would be my position that  
22 Mr. Terhaar is one of many people of his sort at the MSOP.  
23 And that it would be the panel's belief that most of the --  
24 most of the residents who have no adult charges would be in  
25 the same position as he.



1           So, as the Judge has defined the term bellwether,  
2           I believe Mr. Terhaar meets that definition.

3           BY MR. BRENNAMAN:

4           Q.   Okay, and I wanted to -- I don't have a lot more  
5           questions for you, Mr. Wilson, but I did want to ask you a  
6           few questions about Mr. Terhaar and Ms. Bailey. I think  
7           I'll focus most of my questioning to the individuals who  
8           sort of structure it the way the Court has structured it  
9           just so we don't get into too much repetition and so on.

10                  Do you believe Mr. Terhaar should have been  
11           civilly committed?

12           A.   No.

13           Q.   Mr. Terhaar -- are you aware he stipulated to civil  
14           commitment, though, is that right?

15           A.   Yes, I know that.

16           Q.   Do you believe that Mr. Terhaar at the time he was  
17           committed needed any supports or care or treatment?

18           A.   Yes.

19           Q.   Was he -- did he continue to be a security risk, in  
20           particular, to individuals and children who were younger  
21           than him and more vulnerable than him?

22           A.   Maybe.

23           Q.   Do you know what options were available to the  
24           committing courts besides MSOP that would have provided the  
25           well of supports and care and treatment and protection to

1 the public that would have been adequate for Mr. Terhaar?

2 A. No.

3 Q. With regard to Ms. Bailey -- I'm sorry -- still on  
4 Mr. Terhaar.

5 Does Mr. Terhaar receive treatment at MSOP?

6 A. Yes.

7 Q. I know that there are some statements in the report that  
8 the treatment that he receives may not be -- may be able to  
9 be improved through doing some additional trauma-related  
10 treatment; but, by and large and aside from that  
11 trauma-related issue, is the treatment that he's receiving  
12 appropriate for the type of -- where he's at?

13 A. No.

14 Q. And how is it not appropriate?

15 A. I believe he never should have been there in the first  
16 place. So, the treatment he's being offered, I would argue,  
17 is inappropriate to him in that he doesn't need intensive  
18 sex offender treatment, which is what he's in. And that  
19 really what he ought to be getting is the sort of support  
20 and counseling that would assist him in being able to  
21 develop a life out on the street.

22 Q. Isn't that a matter of placement, though, more, rather  
23 than treatment? Your position is he's in the wrong  
24 placement, is that right?

25 A. Yes.

1 Q. I guess aside from that issue, then, I mean, given the  
2 tools that MSOP has, is it trying to do what it can do for  
3 Mr. Terhaar, given the placement that he's in?

4 A. In our field there are some general principles that we  
5 should adhere to with respect to making sure that people do  
6 as well as they can within the programming they're offered.

7 The first of those principles is called the risk  
8 principle. It says that the level of intensity of treatment  
9 should match the level of risk posed by the individual. I  
10 don't believe that Mr. Terhaar poses a high risk to  
11 re-offend; therefore, it's inappropriate to place him in a  
12 treatment program that is of high intensity.

13 The second principle is the need principle, says  
14 that we have to specifically target those areas that  
15 actually contribute to that risk. Given that Mr. Terhaar is  
16 not at high risk to sexually offend, I'm not sure that he  
17 should be in a sex offender treatment program at all.

18 Some of the things that he would be receiving at  
19 the MSOP, which are not the specific targets of the sex  
20 offender treatment program are things that are likely  
21 helping him, but those are the sorts of things he could  
22 receive in a number of different places and perhaps better  
23 in a place that was not a high-intensity sex offender  
24 treatment program.

25 The third of those principles is the principle

1 with respect to treatment responsivity, which means that the  
2 program should be responsive to the individual.

3 I don't believe that Mr. Terhaar has been well  
4 served by his placement at the MSOP. I think that the  
5 environment has probably, probably inhibited him from  
6 becoming more mature and from being able to develop the  
7 sorts of skills and -- skills and understandings of what it  
8 would be to be a young adult living in -- living in the  
9 community. So, I think, all around, his placement at the  
10 MSOP breaks pretty much every rule that the research tells  
11 us we should follow.

12 Q. Okay. And again, though, these Defendants run the  
13 program. You'd agree with me, wouldn't you, that they did  
14 not play a role in the commitment of Mr. Terhaar?

15 A. No.

16 Q. They received Mr. Terhaar once he was committed. Do you  
17 agree with me?

18 A. Yes.

19 Q. Do you feel like under those circumstances these  
20 Defendants in this case, aside from the decision to place  
21 him in the program, have done their best to provide the  
22 treatment they can provide him to improve him? And you've  
23 just testified that he has improved at least in part because  
24 of the treatment.

25 A. From an ethical standpoint -- and I'll speak for myself

1 as someone who was the clinical director of a program not  
2 dissimilar to this one. If there was someone within my  
3 program that I believed didn't belong there, then I would do  
4 my best to see that that was brought to light.

5 In this case, I'm not sure why Mr. Terhaar is  
6 still there. I'm not sure why he was ever there in the  
7 first place, outside of the fact that that was what the  
8 Court decided. I believe that process was also flawed.

9 Q. Okay. With regard to Ms. Bailey, I get the sense from  
10 your report it's a similar problem, it's all about  
11 placement. She should not be placed with men. Is that the  
12 gist of the problem with Ms. Bailey?

13 A. Yes.

14 Q. Is the program attempting to provide treatment to  
15 Ms. Bailey?

16 A. I believe they are attempting to provide treatment to  
17 Ms. Bailey.

18 Q. And is the treatment that they're attempting to provide  
19 her appropriate from a clinical standpoint?

20 A. No.

21 Q. And what are the reasons it is not?

22 A. She's in a group with a bunch of men. She's focusing on  
23 issues that are fundamentally issues for men. She's housed  
24 in a unit with men. All of the research with respect to  
25 female sex offenders is very clear that they are different

1 from men. In any circumstance where she's being treated  
2 with men and also living with men in a program designed for  
3 men is fundamentally inappropriate.

4 Q. Okay. You're aware, aren't you, that she is the only  
5 committed female sex offender in the State of Minnesota?

6 A. Yes.

7 Q. And that there are just not that many female sex  
8 offenders to begin with, but especially in the State of  
9 Minnesota; is that right?

10 A. Yes.

11 Q. And so, is placement with other female sex offenders, do  
12 you know of a placement where she could be housed with other  
13 female sex offenders?

14 A. No.

15 Q. Do you know of any placement outside of MSOP to which  
16 she could be provisionally discharged that would be  
17 appropriate for her, the needs of public safety and for all  
18 of the diverse treatment that she needs as reported in your  
19 report?

20 A. No.

21 Q. But as I understand it, is it appropriate for her to be  
22 housed with mentally ill individuals and mentally ill and  
23 dangerous individuals in a location on the St. Peter Campus?

24 A. It may be.

25 Q. And what criteria do you feel would need to be in place

1 for that to be a situation that would work?

2 A. There would need to be individualized treatment for her  
3 that matched those three principles that I just spoke to.  
4 To the extent that there are -- that there are clinical  
5 staff who can work with her with respect to sexual issues,  
6 with respect to trauma, with respect to female-specific  
7 sorts of issues, if those services were available at the  
8 Minnesota State Hospital, that would be acceptable.

9 Q. Do you know whether they are?

10 A. No, I don't.

11 Q. Do you know whether any of the mentally ill or mentally  
12 ill and dangerous women housed at the Minnesota Security  
13 Hospital on the St. Peter Campus have issues that overlap  
14 with Ms. Bailey, such that those resources may exist?

15 A. I don't know specifically because I don't know those  
16 cases. It would be extraordinary for Ms. Bailey to be the  
17 only sexually reactive woman in the State of Minnesota.

18 Q. I'd like to talk to you about the standards you used  
19 when reviewing these individuals or the standard that you  
20 are using. I notice that both reports use the language of  
21 Chapter 253D and the language of transfer, provisional  
22 discharge and discharge.

23 When you were going through these files and  
24 looking at the files, were you using the statutory text for  
25 those transfer, provisional discharge and discharge

1 provisions as the standard by which you were measuring  
2 whether any individual should be released or moved?

3 A. We were informed by them, I don't know that we  
4 explicitly adhered to them in all circumstances.

5 Q. What standard do you apply?

6 A. Whether or not the individual posed a -- was sexually  
7 dangerous and posed an inordinate amount of danger to the  
8 community, and whether or not they were receiving the  
9 treatment that was best suited to address their issues.

10 Q. Okay. But, you said for both Mr. Terhaar and  
11 Ms. Bailey, that you don't -- well, that you didn't know of  
12 a place, you don't know of a placement for Ms. Bailey that  
13 exists outside MSOP, and at the time of his commitment, at  
14 least, you don't know of any placement for him.

15 Do you have a good sense of different placements  
16 that are available in the State of Minnesota for these  
17 individuals that would be both willing to accept individuals  
18 and provide the type of public safety and treatment that's  
19 needed to care for those individuals?

20 A. No.

21 Q. When I spoke to the four -- with the four of you last  
22 week, you also talked about a constitutional standard. Is  
23 that -- I can't remember which of you said that because it  
24 was a little hard to pick up voices on the phone. But do  
25 you believe you are also being informed by an idea about a



1 constitutional standard? What is your understanding of  
2 that?

3 A. I believe it was Dr. Freeman, although she may kill me  
4 for having said so. And yes, we are informed by the Supreme  
5 Court's -- by the Supreme Court's judgments on the civil  
6 commitment issue.

7 Q. Okay. And have you read those decisions?

8 A. Not recently; but yes, as someone who is the clinical  
9 director of a civil commitment program and who has written  
10 somewhat extensively on the issue, I have a general  
11 understanding.

12 Q. And what is your understanding of that constitutional  
13 standard?

14 A. That the individuals who are civilly -- who are civilly  
15 committed should not be there simply for the purpose of  
16 preventative detention, that they should be receiving  
17 treatment that is intended to address the issues that had  
18 them civilly committed in the first place, such that once  
19 they are no longer a danger to the community, that they can  
20 be returned to the community.

21 Q. And did you get any direction from the Court about what  
22 standard to apply when reviewing these files, as a legal  
23 matter?

24 A. I don't believe so.

25 MR. BRENNAMAN: No further questions for

1 Dr. Wilson, Your Honors.

2 THE HONORABLE JUDGE FRANK: All right.

3 Mr. Gustafson?

4 MR. GUSTAFSON: Thank you, Your Honor.

5 **DIRECT EXAMINATION**

6 **BY MR. GUSTAFSON:**

7 Q. Good afternoon, Dr. Wilson. I'm Dan Gustafson. I'm one  
8 of the lawyers for the Plaintiffs in the Class. Thank you  
9 for helping the Court and the parties with this case.

10 Earlier in response to questions from counsel, you  
11 had suggested that the Judge was looking for cases that  
12 suggested a release or change in custody. Did the Judges'  
13 comments refresh your recollection on that?

14 A. Yes.

15 Q. Tell me what you recall.

16 A. The issue was one of trying to be expedient, to try to,  
17 you know, sort of have a sense of what the case was within  
18 these certain sub-groupings. And if there were individual  
19 cases that would be representative of the sort of larger  
20 group of them, could we write a report on those that would  
21 assist the Court in moving forward.

22 Q. And I take it from your conversations with the Court  
23 that the Judge never told you what kind of an opinion to  
24 reach on any of these individuals, is that right?

25 A. No, absolutely not.

1 Q. No one from the Court or the Court's staff or anyone  
2 else ever suggested that you should come to any certain  
3 conclusion about anybody, correct?

4 A. No.

5 Q. All of the conclusions that you reached with respect to  
6 Mr. Terhaar and Ms. Bailey, those are all your own opinions,  
7 they're not influenced by anything the Court said, is that  
8 right?

9 A. No.

10 Q. And there's been a line of questions that were asked of  
11 you with respect to whether you knew of alternative  
12 placements for either Mr. Terhaar or Ms. Bailey. That was  
13 not part of your task from the Court, was it, to find  
14 alternate placements for people?

15 A. No.

16 Q. Were you asked by the Court to survey the potential  
17 placements within the State of Minnesota to see if there  
18 were alternative placements that might be available for  
19 people who were inappropriately placed at MSOP?

20 A. No.

21 Q. I take it that if you were asked by the Court, you could  
22 create for Ms. Bailey a residential situation and a  
23 treatment situation that would satisfy your professional  
24 opinion about what was necessary for her.

25 A. Yes.

1 Q. For example, if the State provided sufficient funds, you  
2 could find a living arrangement that would satisfy your  
3 professional opinion about what she needed?

4 A. I imagine we could, yeah.

5 Q. I mean, you could create one.

6 A. Oh, yes, absolutely.

7 Q. And with respect to the treatment that you believe  
8 Ms. Bailey needs, given the sufficient funds from the State  
9 of Minnesota, you could create a treatment program that  
10 would fit within what you believe, in your professional  
11 opinion, she needs?

12 A. Yes.

13 Q. Is it the case that when you reviewed Mr. Terhaar's  
14 file, that you were shocked to find him at MSOP?

15 A. Yes.

16 Q. And with Ms. Bailey, were you shocked to find her  
17 treated in the manner in which she was treated from a  
18 treatment standpoint and from a living standpoint?

19 A. Yes.

20 Q. And you brought those two cases to the Judges' -- or to  
21 the Courts' attention because you thought they needed  
22 immediate action, is that fair?

23 A. Yes.

24 Q. Do you understand -- I think you mentioned earlier -- do  
25 you understand that there are numerous additional

1 juvenile-only offenders at MSOP that fall into the same  
2 basic category as Mr. Terhaar?

3 A. Yes.

4 Q. And that Mr. Terhaar's case is not an extreme outlier,  
5 but rather is representative of the cases that you will be  
6 reporting on with respect to those juveniles?

7 A. Yes.

8 Q. You understand that Mr. Terhaar was not committed by the  
9 Court after a trial, but rather stipulated to his  
10 commitment?

11 A. Yes.

12 Q. Did you talk to him about that stipulation, that  
13 agreement to be committed?

14 A. Not extensively.

15 Q. Do you have an understanding that he was told that if he  
16 did not admit to the commitment, that he would be found both  
17 a sexually dangerous person and a sexually psychopathic  
18 personality?

19 A. I don't know that we knew that.

20 Q. You don't recall that coming up in your interview?

21 A. No.

22 Q. Do you recall him telling you that they had talked to  
23 him, that if he stipulated to that commitment, that he would  
24 only be at MSOP for a certain length of time?

25 A. I don't know that we knew that.

1 Q. Do you understand that Minnesota law provides for less  
2 restrictive alternatives if the person being committed can  
3 demonstrate that their needs could be met there both from a  
4 treatment and security standpoint?

5 A. Yes.

6 Q. Do you understand that the State of Minnesota has never  
7 provided any less restrictive alternatives for people to be  
8 committed other than the high security MSOP and St. Peter  
9 facilities?

10 A. That's my understanding.

11 Q. Okay. With respect to the petition from Ms. Johnston  
12 for Mr. Terhaar to go to the CPS Program, you don't  
13 disagree, I take it, that Mr. Terhaar could benefit from an  
14 aftercare plan once he is released?

15 A. We believe he needs one, yes.

16 Q. Right. And by "aftercare plan," I mean things like  
17 financial assistance, a place to live, help getting a job,  
18 learning how to use an iPhone, those kinds of things that  
19 normally would have occurred in his life had he not been  
20 committed?

21 A. Yes. We also believe that he could use some aftercare  
22 counseling, and where appropriate, potentially some  
23 psychological treatment, maybe some psychiatric care. That  
24 would depend on his circumstances once he -- when and if he  
25 was released to the community.

1 Q. You understand Minnesota law requires that kind of  
2 aftercare?

3 A. Yes.

4 Q. And that aftercare you're supportive of, but the reason,  
5 I take it, you're not supportive of CPS is because you don't  
6 think that he needs any further custody or control by the  
7 Sex Offender Program?

8 A. That's correct.

9 MR. GUSTAFSON: I have nothing further,  
10 Your Honor, thank you.

11 Thank you, Dr. Wilson.

12 THE WITNESS: Thank you.

13 THE HONORABLE JUDGE FRANK: Additional questions,  
14 Counsel, if you wish?

15 MR. BRENNAMAN: Nothing further, Your Honor. I  
16 had some more about R.B., but maybe we'll give one of the  
17 other experts a chance.

18 THE HONORABLE JUDGE FRANK: You may step down,  
19 sir.

20 THE WITNESS: Thank you.

21 (Witness excused.)

22 THE HONORABLE JUDGE FRANK: You may call the next  
23 expert, if you wish.

24 MR. BRENNAMAN: Defendants call Deb McCulloch to  
25 the stand.

1 THE HONORABLE JUDGE FRANK: As you head for the  
2 stand, I'll just remind you that you remain under oath from  
3 this morning.

4 (Witness previously sworn.)

5 Whenever you're ready, counsel, you may inquire.

6 MR. BRENNAMAN: May I approach, Your Honor?

7 THE HONORABLE JUDGE FRANK: You may.

8 **DEBORAH McCULLOCH**

9 **RECROSS EXAMINATION**

10 **BY MR. BRENNAMAN:**

11 Q. Good afternoon, Ms. McCulloch. Is it Ms. or Doctor?

12 A. Ms.

13 Q. Okay, Ms. McCulloch.

14 Maybe the first thing, I put in front of you, a  
15 document that's entitled, "Summary of Rhonda L. Bailey,  
16 Transfer of Provisional Discharge recommended June 4th,  
17 2014." Is this the report of the Rule 706 experts on Rhonda  
18 Bailey?

19 A. It is.

20 MR. BRENNAMAN: The State would ask that Exhibit  
21 No. 45, the Rule 706 experts' report on Rhonda Bailey be  
22 admitted.

23 MR. GUSTAFSON: Your Honor, I was under the  
24 understanding all of the exhibits were provisionally  
25 admitted so that we didn't have to move them.



1 THE HONORABLE JUDGE FRANK: Just to make sure,  
2 it's provisionally received.

3 (Exhibit 45 was provisionally received.)

4 BY MR. BRENNAMAN:

5 Q. So, as you heard Dr. Wilson testify, I'm sure you're  
6 aware also that Ms. Bailey is the only committed female sex  
7 offender in the Minnesota Sex Offender Program, is that  
8 right?

9 A. Yes.

10 Q. And she's currently housed in the MSOP Alternative  
11 Program Unit, is that right?

12 A. Yes.

13 Q. And that program is designed for individuals of low  
14 cognitive functioning, is that correct?

15 A. That's my understanding.

16 Q. And what is your understanding of how she got there in  
17 2008? We heard in the opening statement from Plaintiffs'  
18 counsel talk of this change whereby people were moved from  
19 the Minnesota Security Hospital to the MSOP. Can you  
20 describe what your understanding of that move was?

21 A. My understanding was that when, I believe it was,  
22 Mr. Benson was appointed to oversee the program, that an  
23 administrative decision was made that all of the, I think it  
24 was, 33 committed persons would move to the MSOP.

25 Q. And who were those? What was the composition of those

1 33 committed persons? Did they all have something in common  
2 that caused them to be housed at the security hospital  
3 rather than at MSOP?

4 A. My assumption is they were at the secure hospital  
5 because forensic issues related to sex offending, but also  
6 that they had mental health or cognitive disabilities that  
7 required specialized services.

8 Q. Do you know when she was at the Special Needs Program at  
9 the security hospital prior to coming to MSOP, whether she  
10 was living with females or males?

11 A. I think it was both.

12 Q. Both in the sense of it was a co-ed floor --

13 A. Yes.

14 Q. -- or that she moved from time to time to female-only  
15 placements and male-only placements, do you know?

16 A. I would have to look at my notes. I reviewed a lot of  
17 records and she moved a lot.

18 Q. Okay. But your testimony is you think the Special Needs  
19 Program may have been a co-ed unit, is that right?

20 A. Co-ed, or there were times when she could have been  
21 placed just with women on a unit, I'm not sure.

22 Q. You don't dispute, do you, that Ms. Bailey continues to  
23 need care in a secure treatment facility; do you?

24 A. I don't agree.

25 Q. Okay. What level of security and treatment does she

1 need at a placement?

2 A. From my perspective, Ms. Bailey would be able to live in  
3 a community, in a community-based residential or a community  
4 adult foster care. There are multiple -- I'm not sure about  
5 Minnesota's specific licensed facilities, I'm more familiar  
6 with Wisconsin's. But I'm sure they're relatively similar  
7 in that she would be in a secure -- not a secured setting  
8 but a supervised setting, as well as at least initially that  
9 she would be constantly supervised when she would be outside  
10 of the residence.

11 Q. And what level of supervision would she need while she  
12 was in the residence?

13 A. It would depend on all the circumstances, who else lives  
14 there, who -- you know, what kind of living setting it is.

15 Q. It's my understanding that the Rule 706 experts believe  
16 that she should either live where there are both women and  
17 men or where there are women. Is that a fair  
18 characterization?

19 A. I think that from my perspective and the discussion was  
20 that she should be living in a place where she's not alone,  
21 but that would benefit from having other women that she  
22 would be living with.

23 Q. Let's say she was living with other women. What type of  
24 supervision would be needed in that type of setting for her?

25 A. Well, I can only compare it to my familiarity with

1 settings in Wisconsin for similar people, although they may  
2 be men or women, and those might be supervised apartments,  
3 they might be transitional living facilities, they might be  
4 community-based residential facilities.

5 In Ms. Bailey's case, it may mean that if she were  
6 in a community-based residential facility, for example, that  
7 her room -- there would be a wait staff 24 hours -- but her  
8 room and other rooms would be alarmed so that staff would be  
9 alerted at night, for example. But that she would be under  
10 supervision, meaning visual supervision by staff, and then  
11 transition progressively to less supervision as she  
12 progresses.

13 Q. And as I understand it Ms. Bailey -- can you tell us  
14 more about how she presents as a sexual offender? As I  
15 understand it, she offends against minors, children, but  
16 also offends against other women, is that correct? And  
17 could you sort of tell us more about how she's presenting as  
18 a sex offender?

19 A. Sure. So, I would characterize her as being reactive in  
20 that relative to her sexual offending is her experience as a  
21 very traumatized young child into her adulthood, and having  
22 no other experience, sexually or in relationships. So that  
23 when she is, for example, in a setting where there are other  
24 adults, where there is discussion about sexual behavior,  
25 that she can be flirtatious not only with other patients or

1 clients, but also with staff. She is very sexually  
2 preoccupied.

3 Can I -- I'm really uncomfortable with another  
4 client being in the Court and having two clients just  
5 because of confidentiality. I just feel very uncomfortable  
6 as a clinician talking about one client with another client  
7 in the courtroom. I can answer your questions, I just want  
8 to make sure the Court is aware that I'm uncomfortable about  
9 that.

10 MR. GUSTAFSON: Your Honor, we would have no  
11 objection with Mr. Terhaar waiting outside of the courtroom  
12 while we have the testimony about Ms. Bailey. I think  
13 that's a good suggestion.

14 MR. BRENNAMAN: Whatever the Court wants to do.

15 THE HONORABLE JUDGE FRANK: Then I think we might  
16 utilize -- outside of the courtroom might mean utilizing  
17 the -- this exit here, if we wish? Why don't we do that,  
18 counsel? Why don't we -- we can do that at this time.

19 Rather than -- let's just take a 15-minute recess  
20 right here. It's a little early in the afternoon. Let's  
21 take fifteen minutes, here, and we'll see you back in  
22 fifteen. You may step down.

23 Counsel, we will need help from the deputy  
24 marshals -- oh, sorry. We'll stand in recess for fifteen  
25 minutes.

1           You may step down.

2           THE WITNESS: Can I leave this here?

3           THE HONORABLE JUDGE FRANK: Yes, you can leave it  
4 all there. We'll see you in fifteen.

5           (Recess.)

6           THE HONORABLE JUDGE FRANK: You may all be seated,  
7 thank you.

8           Whenever you're ready, counsel.

9 BY MR. BRENNAMAN:

10 Q. Ms. McCulloch, you were telling me about R.B.'s  
11 presentation. Before we do that, though, I got a little  
12 ahead of myself. Can I go back?

13           I'd like to ask if you agreed with the testimony  
14 of Dr. Wilson.

15 A. It depends on which part.

16 Q. Let's go through it.

17           In the parts where he was talking about process,  
18 did you agree with Dr. Wilson?

19 A. The process? Uh-huh.

20 Q. And then --

21 A. With the exception of -- I think that the cases that we  
22 distributed amongst ourselves, we spent far more time on  
23 reviewing those in-depth. And there were many more of them.

24 Q. Okay. And so what percentage of your time do you feel  
25 like you've spent on the cursory review and how much time

1 have you spent on doing the in-depth review?

2 A. I think I've done much less cursory review and much more  
3 time in the in-depth reviews.

4 Q. Okay. Can you give me sort of relative percentages of  
5 time spent?

6 A. I would say maybe 25 percent of my time doing cursory  
7 reviews, and much more of my time doing in-depth reviews.

8 Q. And, again, the in-depth reviews, in your understanding,  
9 are reviews on files in which it was determined during the  
10 cursory review phase that there was a problem either with  
11 placements or the fact of commitment in the MSOP program, is  
12 that right?

13 A. Actually, no.

14 Q. Okay, what?

15 A. So, prior to our going to Moose Lake last time, we took  
16 the list of juvenile-only, which I refer to juvenile-only  
17 offenders, as well as a list of men with either a 25-bed  
18 unit -- I forgot what it's called -- but physical  
19 limitations or elderly.

20 Q. Assisted Living Unit?

21 A. Yes, uh-huh. And I believe it was Naomi or one of us, I  
22 can't remember who. Actually, it was Mike, who took that  
23 list and divvied those names up. And then we did reviews of  
24 those cases, regardless of whether we thought there may be a  
25 problem or not. And we reviewed all of those cases.

1 Q. An in-depth review?

2 A. An in-depth review.

3 Q. Okay. There was --

4 A. Now, I wouldn't say that it was an in-depth review in  
5 that there's a difference from my perspective between an  
6 in-depth review and then a review to do a report. We did  
7 not do reports or assign anybody specifically to write a  
8 report. So that would take really considerably more time.

9 Q. Okay. So what I hear you saying is that contrary to  
10 what Dr. Wilson was telling me, he was describing a process  
11 where 25 percent of the files were going to get a cursory  
12 review. And then if one of these two conditions exist,  
13 either wrong placement or fact of commitment was bad, there  
14 was going to be an in-depth review done. What I hear you  
15 telling me is there was some subset of files that it was  
16 just determined right from the get-go you'd just start by  
17 doing an in-depth review, is that --

18 A. Uh-huh.

19 Q. -- is that what you are telling me?

20 A. Yes. I think especially when we made our visits, we had  
21 names from MSOP, from the ombudsman's office, et cetera,  
22 that we looked at some of those cases as a cursory while we  
23 were all together in meeting, and looking at enough  
24 information, that we would then share it with somebody else  
25 on the panel, and then making a determination from that



1 whether we would look at those in more depth. The others  
2 that we looked in more depth, we assigned amongst the group.  
3 Q. And when you were looking in more depth, it was still  
4 focused around these two different areas, right? Either  
5 because someone had this juvenile offense history, they  
6 shouldn't be in the program, or maybe they should be in the  
7 program, but they're not in the right placement, they should  
8 be somewhere else. Those were the two things you were  
9 focusing on?

10 A. I would characterize it as looking at vulnerable  
11 populations. So, persons with severe mental illness,  
12 persons with intellectual disabilities, persons with serious  
13 medical issues or that maybe have dementia or other medical  
14 conditions, and then also the juvenile-only offenders,  
15 meaning those that do not have any adult convictions, just  
16 juvenile adjudications.

17 Q. Okay. And what is the issue with the mental illness --  
18 I'm sorry -- so Dr. Wilson told me that when he was doing a  
19 cursory review of a file, he was mostly looking at placement  
20 and commitment, you know, to see whether an in-depth review.

21 Are you talking -- are you saying that severe  
22 mental illness or untreated, in addition to the  
23 juvenile-only history, were factors you considered when  
24 looking at those two criteria?

25 A. Correct, because when we're looking at the whole

1 program, again, sort of in terms of what Dr. Wilson talked  
2 about, risk needs responsivity, we're looking at  
3 particularly those people who have different needs that are  
4 not what some people call sex offender treatment specific.  
5 But they're treatment-interfering factors. And there are  
6 other needs that persons who commit sex offenses have that  
7 isn't sex offender treatment.

8 Q. Dr. Wilson also talked to me about the instruction that  
9 the four of you had received from the Court. Did you feel  
10 like he accurately testified about that, and do you agree  
11 with him about what that instruction was?

12 A. I would say that the instruction was from the Court to  
13 focus particularly on those populations, and I believe the  
14 Court Order also identified those specific populations for  
15 us to focus on.

16 I would also say when thinking about in terms of  
17 bellwether cases, I think my understanding really was  
18 representative, that's the word I had in my head was  
19 representative cases.

20 Q. Okay, but when you're looking at a particular file, what  
21 makes you think it might be a bellwether file,  
22 representative of what fact? Of a -- it sounds like from  
23 what Dr. Wilson was testifying about, it was representative  
24 of a type of problem. For instance, the juvenile-only  
25 offenders. Mr. Terhaar, as I understand from the testimony

1 so far, may be representative of a problem with  
2 juvenile-only offenders being committed to this treatment  
3 facility; is that right? It's representative of a problem?

4 A. Representative of looking at the standards relative to  
5 risk needs responsivity when it comes to treatment, but also  
6 keeping in mind the standards in *Hendricks* relative to  
7 having a disorder, as well as a standard of how high a  
8 person's risk is to re-offend. Not that they would have no  
9 risk, but they're more likely than not to re-offend. And  
10 then looking at the research that informs and helps  
11 psychologists, in particular, evaluate risk with actuarial  
12 instruments.

13 Q. So representative of people who are either not in the  
14 right placement at MSOP or who should not have been  
15 committed to MSOP?

16 A. Yes, uh-huh.

17 Q. Do you remember who the report on Eric Terhaar was  
18 submitted to? Dr. Wilson did not remember. It's dated May  
19 18th. You'll remember, possibly. Was that submitted  
20 directly to the Court or was that submitted to the parties,  
21 as well?

22 A. I believe our direction was, and I believe both reports  
23 were submitted to Mr. Ferlager's office for dissemination.

24 Q. Okay. And do you know what date Mr. Ferleger submitted  
25 those to the parties?

1 A. I do not.

2 Q. Getting back, then, to the presentation -- how -- you  
3 were telling me -- and why don't you just continue, now that  
4 we have things worked out, the presentation of R.B.. You  
5 were telling me more about her sexual offending and how  
6 she's currently presenting from a clinical standpoint.

7 A. From a clinical standpoint she represented to us,  
8 especially when we interviewed her and then reviewed her  
9 records, that many of her behaviors are what we would refer  
10 to as reactive to her own trauma, sexual trauma, physical  
11 trauma, psychological trauma as a child and into her  
12 adulthood.

13 And so, engaging in those behaviors, which are  
14 problematic, of course, but also that there are areas that I  
15 would refer to and others would refer to as  
16 treatment-interfering factors, dealing with that trauma  
17 before you can get to some of the other areas about  
18 offending or what is an appropriate sexual relationship.

19 Q. Do you -- would you agree that Ms. Bailey is still at  
20 risk to re-offend?

21 A. Do I believe she's a risk to re-offend?

22 Q. Yes.

23 A. I believe that Ms. Bailey presents risks.

24 Q. And how would you describe those risks?

25 A. When you say "risk to re-offend," do I believe she has

1 risks to offend? Yes. I believe she has some criminogenic  
2 needs. I believe that she has some risks. And I think that  
3 those can be ameliorated and/or there are protective factors  
4 that can be put in place for her not to have those factors  
5 be present.

6 Q. Turning to treatment, does Ms. Bailey receive treatment  
7 at MSOP?

8 A. She does.

9 Q. Does that -- one of the criticisms of your report, as I  
10 understand it, is it does not -- the treatment that she  
11 receives at MSOP does not focus or focus enough on the fact  
12 that she is a woman. Is it your opinion, though, that the  
13 program does not pay any attention to the fact that she is a  
14 woman in the type of treatment they provide to her?

15 A. I wouldn't say they don't pay any attention. No, of  
16 course not.

17 Q. What are they doing in terms of her treatment that  
18 acknowledges her gender and incorporates that into her  
19 treatment?

20 A. I believe she's provided some individualized treatment  
21 with a treatment provider.

22 Q. Of what nature?

23 A. Individual psychotherapy.

24 Q. Okay. Do you -- and that's --

25 A. So it's one on one. So, it's her and a therapist.

1 Q. Is there anything else the program does to provide her  
2 treatment that's tailored to her gender, amongst other  
3 factors that are going on with her, the treatment that she  
4 needs?

5 A. Not that I would -- no, not specifically.

6 Q. Tell me more about the -- I know that Ms. Freeman also  
7 testified about this, initially, but are there established  
8 best practices regarding the treatment of female sex  
9 offenders?

10 A. I wouldn't say that I'm aware that there are  
11 specifically best practices for female sex offenders. I  
12 would say that there are a number of best practices when  
13 working with this population of women and men, for that  
14 matter.

15 One of those standards really is that discharge  
16 planning, for example, starts on admission, not at the end  
17 of confinement, but starts at the beginning to prepare  
18 people for living in the community.

19 With regards to working with women, in particular,  
20 women who have offended sexually, I testified earlier to  
21 addressing those psychological factors, as well as  
22 criminogenic needs, and then also supportive therapy -- or  
23 supportive services -- excuse me.

24 Q. Is the lack of established best practices related to the  
25 fact that there are so few female sex offenders, and

1       therefore there is just not the type of empirical data that  
2       there is, for instance, compared to male sex offenders? Is  
3       that -- is that part of the issue?

4       A. I think that can be part of the issue.

5       Q. Are there any other factors?

6       A. Well, I think that most of the research has been done on  
7       men and risk that men pose and risk that can be ameliorated  
8       with treatment and specific focus on treatment to risks. I  
9       think that there are very few women, and so then there's not  
10      that research basis. But I think there are standards of  
11      practice working with women who have boundary issues,  
12      reactive issues, trauma issues.

13      Q. Would you agree with me that there are overlapping  
14      principles, at least, between the treatment of male sex  
15      offenders and the treatment of female sex offenders, that  
16      there are some principles about treatment of sex offenders  
17      that apply to each group?

18      A. There may be some.

19      Q. Okay. Can you think of any? Can you describe what  
20      those might be?

21      A. No, actually, I couldn't.

22      Q. So, are you changing your answer, are there none?

23      A. Because I can't come up with any, that doesn't mean I  
24      don't necessarily think there aren't any. I think there are  
25      probably some that there are commonalities. But there is

1 such a small risk to re-offend, it's near impossible to  
2 identify what those specifically are as they apply to women.  
3 I know Dr. Freeman can answer that much more clearly than I  
4 can.

5 Q. Is that -- the risks -- I'm forgetting the exact number  
6 in your report, but I believe that you note at one point the  
7 risk of re-offense is only 1 or 2 percent for females?

8 A. Right.

9 Q. Is that Ms. Bailey's risk of re-offense, just 2 percent?

10 A. Well, I don't know that we look at a percentage, but  
11 clearly, when we're talking about more likely than not to  
12 re-offend, a person would need to be higher than 50 percent  
13 to re-offend.

14 Q. Ms. Bailey has re-offended after being in placement,  
15 isn't that correct, or during placements? Is that your  
16 understanding?

17 A. Having had sexual contact with other vulnerable people,  
18 yes. I'm not aware that she was charged with any other  
19 sexual offenses. I don't recall, anyway.

20 Q. Maybe if you turn to page 3 of your report. You say in  
21 the second and third paragraph in 1990 -- I'm reading from  
22 the second sentence of the second complete paragraph. "In  
23 1997, Ms. Bailey was returned to prison and served the  
24 remainder of her prison sentence for violating the  
25 conditions of her 20 years' probation when she sexually



1 abused a vulnerable female adult patient at MSA, it's the  
2 Minnesota Security Hospital."

3 So, is that what you understand? So, she wasn't  
4 criminally charged, but her probation was revoked and she  
5 was returned to prison, is that --

6 A. She was returned to prison as a probation violation, as  
7 I understand it.

8 Q. Does the program take appropriate steps to ensure  
9 Ms. Bailey's safety in her current placement?

10 A. Protecting her physical safety?

11 Q. Yes.

12 A. I know they do take some precautions, that she's  
13 supervised directly at all times except when she's in her  
14 room locked.

15 Q. You note in your report that R.B. has expressed safety  
16 concerns, a couple of questions about that.

17 First, do you know of her having been assaulted,  
18 or hit, or threatened by any other client at MSOP while  
19 she's been there?

20 A. Assaulted or threatened? Not that I'm aware of.

21 Q. The concerns that R.B. expressed to you during the  
22 interview, what were those about her safety?

23 A. She talked about her concerns relative to knowing that  
24 there were new clients coming from Moose Lake to St. Peter,  
25 and concerns about not knowing who those men are, what their

1 histories are, their capabilities. She was concerned about  
2 a whole group of men coming to St. Peter and feeling  
3 frightened about that.

4 She also expressed that her group members or some  
5 of her group members have been progressing, so that they  
6 would move, perhaps, to either another unit or another phase  
7 in treatment; and therefore, then, new men would be  
8 introduced to her group. And she was worried about that and  
9 concerned about that.

10 Q. Aside from placement among men, could you explain to me  
11 in more detail the deficiencies you identify in your report  
12 about the treatment that Ms. Bailey is receiving?

13 A. Throughout the record, there are numerous references to  
14 a specialized treatment plan and making reference -- these  
15 are particularly the psychiatric notes and review, and  
16 making reference to needing to develop a specialized plan  
17 for her, repeated references to looking at medical  
18 intervention or pharmacological interventions because she  
19 was harming herself with excessive masturbation, for  
20 example. But throughout that record, I didn't find where  
21 those specific interventions were operationalized.

22 Q. Do you know that they were not for sure?

23 A. No.

24 Q. Besides the specialized treatment plan and the  
25 psychiatric treatment plan, you talked about this type of

1 treatment, EMDR. Could you explain a little bit more what  
2 that is? I understand from your report that that's a  
3 recommended form of treatment that Ms. Bailey receive that  
4 she is not receiving.

5 Is that typical in a sex offender program?

6 I'll stop there. That's too long a question.

7 Just tell me more about EMDR, if you would.

8 A. I'm not trained in EMDR, but it is a recognized  
9 treatment for people with PTSD or other trauma issues. Eye  
10 movement -- I have to write it down -- Eye Movement  
11 Desensitization Reprocessing.

12 I don't know if it's a standard treatment, but we  
13 also referred to DBT, Dialectical Behavior Treatment or  
14 therapy. That is a standard for -- that can be used, skills  
15 training and so forth for people that have some of those  
16 issues. We offer that in our program.

17 Q. And when you say "those issues," you mean those types of  
18 treatment are focused on trauma-related care?

19 A. Yes. Yes.

20 Q. So it's not sex offender-specific types of treatment,  
21 it's more directed towards trauma and care, am I  
22 understanding that correctly?

23 A. Right. When you look at the population of, you know,  
24 civilly-committed sex offenders and you are talking about  
25 being responsive to their needs, there are a good number of

1       them that have trauma histories and behavioral issues  
2       related to that, emotional dysregulation, those kinds of  
3       things. That, you need to address, in order for them to  
4       successfully participate in the sex offender portion of the  
5       programming because it interferes with treatment.

6       Q. So, the report concludes that Ms. Bailey should not be  
7       housed among men.

8               Do you have a recommended placement for her?

9       A. A specific recommended placement for her? No. I would  
10      recommend that if one doesn't exist, I'm assuming that there  
11      are many people in Minnesota that work for the Department or  
12      work for her county that would be able to look into whether  
13      something exists. And I am not saying and I don't think the  
14      panel is saying she needs to be with other sex offenders,  
15      but with other people who need her level of services; that  
16      if one doesn't exist, that one could be created for her,  
17      building the services around her.

18      Q. When you say "need her level of services," I guess I  
19      don't understand what that incorporates. I understand that  
20      the treatment of Ms. Bailey is complex.

21      A. Yes.

22      Q. It involves sex offender issues, but it also involves  
23      these trauma issues, it also involves -- I don't know.  
24      Maybe you can explain more of that to us.

25              But I mean, how much on the same level do people

1 need to be in? Is there anyone like that? I'm just not  
2 understanding what type of other patients it would be  
3 appropriate to house Ms. Bailey with?

4 A. Well, I wouldn't necessarily say she needs to be with  
5 other patients. There may be settings in which she could  
6 live with other people that would be supportive and provide  
7 her with those services and supervision. I would find it  
8 hard to believe that there aren't other women, or men, for  
9 that matter, men and women who have intellectual  
10 disabilities that have serious sexual boundaries, for  
11 example, or that have psychiatric issues or trauma issues.

12 Q. So, when we're talking about alternative placements,  
13 we're talking about -- one way to divide it up is what's  
14 within the Department of Human Services' control and then  
15 private placements?

16 A. Uh-huh.

17 Q. Are you aware of any private placements that would be  
18 willing to accept Ms. Bailey, given the type of treatment  
19 she needs and the supervision levels that she needs?

20 A. I didn't look at what is available in the State of  
21 Minnesota or make any referrals.

22 Q. If you could turn to page -- I'm sorry -- so speaking,  
23 then, in terms of what is within the Department's control --

24 A. Uh-huh?

25 Q. I mean, what -- at the St. Peter Facility, as I

1 understand it, there are other populations of women. I  
2 don't know the extent to which they're co-ed populations,  
3 but would it be appropriate -- the populations that I know  
4 of there are mentally ill women and mentally ill and  
5 dangerous women.

6 What are the issues with placing Ms. Bailey in  
7 a -- in a setting with individuals who have those diagnoses  
8 or those commitment status, I guess, is what those are?

9 A. Right, it would be from my perspective that wherever  
10 Ms. Bailey would be placed, whether it would be in one of  
11 those settings where there are other women, that she would  
12 need a specialized program, that she would need specialized  
13 services that probably don't exist in those programs anymore  
14 than they exist at the MSOP. They would need to be provided  
15 to her, perhaps from an outside agency or through a  
16 specialized program that the staff could provide for her.

17 Q. What is -- you talked a little bit about the level of  
18 supervision, but I just want to make sure I'm understanding  
19 you. Because, you know, we did have this event, it looks  
20 like, in 1997 where there was some sexual contact that led  
21 to the revocation of her probation.

22 If she were housed with vulnerable women -- and I  
23 think in Minnesota by definition, mentally ill, committed  
24 women and mentally ill and dangerous committed women are de  
25 facto considered vulnerable individuals. If she was housed

1 with them, does that change the level of treatment and  
2 supervision that you believe she would need?

3 A. Well, I would -- using a clinical term rather than a  
4 legal term, I would say that she's also vulnerable. And  
5 that the services would be dependent on who else was there  
6 and what kinds of supervision, that whether she had sexual  
7 boundary issues or some other issues, when people live  
8 together that have histories of either violence or  
9 compensation with mental illness, those kinds of issues that  
10 come up, substance abuse, the program then is tailored to  
11 what risks they present to the community they're living in.

12 Q. And so, there's a mention of this -- I can't remember  
13 now if it's in your report. You're aware of the Shakopee  
14 program, though? It seems to be a program held at the  
15 Shakopee Prison that deals with -- not committed female sex  
16 offenders, but sex offender treatment in the Shakopee  
17 Program.

18 Now, is the suggestion that that could be part of  
19 the treatment for Ms. Bailey, is that realistic, or does the  
20 fact that that occurs -- does the type of treatment there --  
21 would it even be helpful to her?

22 A. I know little to nothing about the Shakopee Program. I  
23 would have to look at the program. There are lots of  
24 correctional programs that don't necessarily meet the  
25 standards or programming needs of sex offenders.

1 Q. So, how would this work? Let's say a placement was  
2 created for her in the St. Peter Campus and she was housed  
3 with other women, possibly mentally ill, mentally ill and  
4 dangerous women. Would she go somewhere for treatment or  
5 would the treatment come to her? Does it matter as a  
6 functional matter?

7 A. When I think about treatment for persons like  
8 Ms. Bailey, really everything people are doing is treatment  
9 and not just a session three times a week, or whatever that  
10 might be. So, some of that treatment and those activities  
11 that she would engage in would be in a community, and  
12 perhaps there might be somebody who, for example, if they  
13 don't have a staff and they decide, determine that she would  
14 be appropriate for EMDR, perhaps a person would be coming  
15 there to provide that. It would be, I think, ideal to have  
16 a mixture of that.

17 Q. Well, that is interesting because -- and so treatment is  
18 more of a holistic thing?

19 A. Yeah.

20 Q. It's your environment that you're surrounded with sort  
21 of the entire time. But that seems to me to be part of the  
22 problem, here, there is no other sex offender female  
23 population that she can do that with such that the entire  
24 environment is created around treating her sex offender  
25 issues.



1           If she's housed, for example, again with mentally  
2     ill, mentally ill and dangerous women, is it possible to  
3     create the environment that fulfills the treatment needs of  
4     all those people so there's sort of full-time treatment  
5     going on all the time? I mean, I'm just trying to think  
6     about this.

7     A. Well, what I would say is relative to Ms. Bailey, the  
8     focus wouldn't necessarily be or be appropriate to focus  
9     specifically on sex offending, but all those other issues  
10    that lower risk to offend or sexually offend.

11   Q. What are those?

12   A. Addressing her trauma, addressing her issues with  
13   relationships and boundaries. I think looking at  
14   psychiatric issues and physical health needs, that she is  
15   very sexually preoccupied and excessively masturbates, for  
16   example, looking at those individual issues with her and  
17   addressing those individually with her.

18   Q. And aside from the psychiatric issues that we talked  
19   about before in terms of the MSOP treatment, do you feel  
20   that the treatment she's getting at MSOP, aside from the  
21   fact that she's with men, is still attempting to address  
22   those different issues?

23   A. No.

24   Q. And how is it deficient?

25   A. I didn't see in the records that the specific issues

1 that she identifies and that we identified related to having  
2 trauma issues and what I would characterize as meeting quite  
3 a few of the symptoms, if not the diagnosis for PTSD, I  
4 didn't see that that was specifically being treated.

5 Q. So, Ms. Bailey was committed in 1993 --

6 A. Yes.

7 Q. -- is that your understanding?

8 Are you aware that the Minnesota Sex Offender  
9 Program has been under some scrutiny for some time? Are you  
10 aware that there are, in this case, in fact, the MPET -- the  
11 MPET team came and evaluated the program. And I think three  
12 of those individuals have been evaluated in the program for  
13 years. Do you know that?

14 A. I've been aware that there have been concerns with the  
15 Minnesota program for a long time, because I live next door  
16 in Wisconsin. And many people from the program, the  
17 Legislature and others from Minnesota have come to visit our  
18 program. So, I'm aware of the concerns of the program, as  
19 well, and their inability to help foster people's releases,  
20 for example.

21 I'm also aware that the sheer numbers that are  
22 committed in Minnesota are an anomaly, making it, I think,  
23 really very difficult for the program to provide the  
24 individualized services for people to progress through  
25 treatment.

1 Q. So, the MPET, the group that I was talking about before  
2 is made up of five individuals, James Haaven, Christopher  
3 Kunkle, Robert McGrath, William Murphy and Jill Stinson.

4 Are you familiar with these individuals?

5 A. Yes.

6 Q. Are they experts in the field?

7 A. Yes.

8 Q. And of those -- well, my question is, she's been  
9 committed to -- she has been at MSOP since 2008; isn't that  
10 right?

11 A. Pardon? Yes.

12 Q. And the program has been under heavy scrutiny for some  
13 time, as you just testified?

14 A. Yes.

15 Q. Why is it that you think that it's just now that someone  
16 -- to your knowledge, has MSOP been hiding Ms. Bailey or  
17 concealing her identity or gender from people?

18 A. I highly doubt it that they've been hiding her. I have  
19 made -- I would have to look back at my records, but I have  
20 had a lot of contact with the Minnesota Program over the  
21 years, and I was shocked to find out there was a woman in  
22 the program. I had no idea. And only because we visited  
23 the facility and that particular unit did I become aware  
24 that there was a woman in the program in the facility.

25 Q. And, I mean, do you think that's just the case that --

1 why do you think it is that no one has ever raised this  
2 before? She's been there for such a long time.

3 A. I don't know. I would be happy to ask all five of them.  
4 I'm not sure that that's what they were looking at, either,  
5 individual --

6 MR. BRENNAMAN: No further questions, Your Honor.

7 THE HONORABLE JUDGE FRANK: Mr. Gustafson?

8 MR. GUSTAFSON: Thank you, Your Honor.

9 **DIRECT EXAMINATION**

10 **BY MR. GUSTAFSON:**

11 Q. Thank you, Ms. McCulloch, for taking the time to help us  
12 here in Minnesota by being one of the court-appointed  
13 experts.

14 You were asked some questions about whether you  
15 were aware of any programs that would take Ms. Bailey. That  
16 was not something that you were asked to do by the Court,  
17 was it, to find a new placement for her?

18 A. No.

19 Q. Are you aware of placements in Wisconsin that would be  
20 suitable if she were in Wisconsin's Program?

21 A. What I can say about that is that there are -- if I can  
22 talk about my experience in Wisconsin and people like  
23 Ms. Bailey, that there are -- we, first of all, have never  
24 had a female referred to our SVP Program.

25 We actually advocated and had our law specifically

1 state that were a female referred or committed, that she  
2 would be placed in one of our female forensic programs.

3 And so Ms. Bailey, aside her needs, meaning, you  
4 know, her cognitive disabilities, her perhaps mental health  
5 needs, treatment needs, supervision, transition in the  
6 community, do I believe that there are facilities in  
7 Wisconsin? There may be, I'm familiar with people like Ms.  
8 Bailey who are men who are in facilities and actually  
9 licensed CBRFs or Community-Based Residential Facilities, as  
10 well as adult foster homes, as well as supported apartments.

11 We place people in the community in Wisconsin that  
12 are SVPs that are like Ms. Bailey, except for their gender,  
13 specific to some of those needs.

14 Q. I take it, like I asked Dr. Wilson, that if you were  
15 asked by the Court, you could design a program that could be  
16 created that would satisfy your professional opinion of how  
17 Ms. Bailey ought to be housed and treated?

18 A. Yes.

19 Q. There's no doubt that the right kind of setting could be  
20 provided if funds were available, is that right?

21 A. Yes.

22 Q. And I wanted to ask you a question. You used the term  
23 reactive several times in your testimony and in your  
24 cross-examination by the government. Can you tell me a  
25 little bit more about what you mean by "reactive"?

1 A. I think Dr. Miner also referred to reactive when he was  
2 referring to juvenile offenders. And I also wouldn't say  
3 I'm the best person on the panel to describe this  
4 specifically, but that she experienced the behaviors as a  
5 youth, as a child, as an adolescent into her adulthood of  
6 the behaviors, then, that she engaged in with others,  
7 reacting to those same behaviors that were basically done to  
8 her.

9 Q. I take it that you mean by that that many of her  
10 sexual -- sex offending, is a reaction to the trauma that  
11 she suffered as a child, is that a fair characterization?

12 A. I think that it's a factor, yes.

13 Q. And that's why you think that treating her trauma is so  
14 important?

15 A. I do think it's very important.

16 Q. And that's one of the things that you didn't see in the  
17 records that you thought you would see when you looked at  
18 her treatment records? You didn't see a focus on that  
19 trauma treatment?

20 A. Correct.

21 Q. You mentioned earlier that you were shocked to find out  
22 that there was a woman in the program. I take it you were  
23 even more shocked to find out she was being housed all with  
24 men?

25 A. That's true.

1 Q. And that she was being put in group therapy. You were  
2 shocked to find out that her group therapy was all with male  
3 offenders.

4 A. Yes.

5 Q. Is it your opinion that her risk to offend in the future  
6 is being exacerbated by the treatment failures of the MSOP?

7 A. Can you say that again?

8 Q. Sure, I'll try.

9 A. Uh-huh.

10 Q. Do you believe -- in your professional opinion, do you  
11 believe that Ms. Bailey's risk of offending in the future is  
12 being exacerbated -- the potential of her risk of offending  
13 in the future is being exacerbated by her current treatment  
14 and living conditions?

15 A. I believe that rather than making her better, she has --  
16 her issues have been prolonged.

17 Q. You mentioned earlier that discharge planning should  
18 begin at the start, I think were the words you used, so that  
19 the treatment and facilities that house someone are working  
20 towards the day in which someone will be discharged. Do you  
21 see that in the Minnesota system?

22 A. No.

23 Q. You also had some questions about best practices,  
24 whether they're because of a lack of women sex offenders in  
25 the country, that there haven't been established best

1 practices. Do you recall that, those questions?

2 A. From my understanding of the literature, the practices  
3 that are described -- and again, Dr. Freeman can speak to  
4 this much more clearly than I can -- is that the focus would  
5 be on those psychological health needs, as well as  
6 criminogenic needs and supportive services, rather than  
7 focusing on what that person did that was considered a  
8 sexual offense.

9 Q. Did you see anything in the record that suggested to you  
10 the 2008 move from the Minnesota State Hospital where  
11 Ms. Bailey was housed to the MSOP Unit was anything other  
12 than an administrative decision?

13 A. No, I understood that she was one of a group, and  
14 because of her legal status, she was moved.

15 Q. Did you see anything in her treatment records that  
16 suggested it would be better for her treatment if she was  
17 moved to the MSOP Facility out of the Minnesota State  
18 Hospital?

19 A. No.

20 Q. Minnesota Security Hospital -- I'm sorry.

21 Did you see the exercise of any professional  
22 judgment with respect to that move as it related to  
23 Ms. Bailey's treatment or condition?

24 A. I think that the people that were working with her were  
25 helping her, at least for a short period of time, to prepare



1 to move.

2 As far as developing a program for her prior to  
3 her admission, I didn't see that in the record. I do  
4 believe and I think that the program takes it very seriously  
5 that she is the only female in her unit; and therefore, put  
6 together measures to help protect her safety from other  
7 people, men, sex offenders on the unit.

8 Q. They took steps to protect her safety, but they didn't  
9 take steps to protect her mental health, did they?

10 A. I do not believe that that was considered.

11 Q. In your professional judgment, does the treatment of  
12 Ms. Bailey satisfy the standards of acceptable treatment for  
13 women who are committed as sex offenders?

14 A. There's so few women committed as sex offenders, I don't  
15 believe that -- if I could, I don't believe that the program  
16 meets her clinical needs.

17 Q. And I just want to go through what it is that you think  
18 should happen.

19 You think she should be moved to a community-based  
20 setting, is that right?

21 A. I think she should move to a setting where she's not  
22 in -- whether it's secure or supervised, I believe she needs  
23 a structured, supervised setting that helps her transition  
24 to as much independence as she is capable of, that addresses  
25 all of her needs, her treatment needs.

1 Q. And when you talk about those treatment needs, that's  
2 what you talked about in your testimony, the trauma and the  
3 things like that?

4 A. Trauma, as well as her physical health needs, her mental  
5 health needs.

6 Q. In Wisconsin, you have a statute that requires an annual  
7 review of all of the committed sex offenders, is that right?

8 A. That's correct.

9 Q. You also have a provision in the statute that provides  
10 for a judicial bypass, rather than for a supervised release  
11 program, correct?

12 Let me try again. That wasn't a very good  
13 question, I'll try it again.

14 You can be released from the program by going  
15 through a supervised release-type process in Wisconsin,  
16 correct?

17 A. When you say "released," we refer to that as discharged.  
18 So, we have inpatient commitment, we have outpatient  
19 commitment, which is the supervised release program, and  
20 then discharged where you're no longer committed to the  
21 Department.

22 Q. If you're committed, you can petition to go on  
23 supervised release, correct?

24 A. That's correct.

25 Q. But you can also go to the court at any time and ask to

1 be discharged, correct?

2 A. A person can petition at any time for discharge.

3 MR. GUSTAFSON: Thank you. I don't have any  
4 further questions, Your Honor.

5 THE HONORABLE JUDGE FRANK: Additional questions,  
6 counsel?

7 MR. BRENNAMAN: A little bit of follow-up.

8 THE HONORABLE JUDGE FRANK: All right.

9 MR. BRENNAMAN: May I approach, Your Honor?

10 THE HONORABLE JUDGE FRANK: You may.

11 **RECROSS EXAMINATION**

12 **BY MR. BRENNAMAN:**

13 Q. The Department has been making efforts, I think  
14 recently, to introduce Ms. Bailey to other females on the  
15 St. Peter campus. Are you aware of that?

16 A. Recently? No.

17 Q. Could you look at -- I put in front of you the Affidavit  
18 of Jannine Hebert.

19 MR. BRENNAMAN: I think the parties have  
20 stipulated to using previous filings in the case,  
21 Your Honors, and I would ask for admission of this.

22 MR. GUSTAFSON: No objection, Your Honor.

23 THE HONORABLE JUDGE FRANK: That exhibit number  
24 is?

25 MR. BRENNAMAN: 42.

1 THE HONORABLE JUDGE FRANK: That's received.

2 (Exhibit 42 is received.)

3 BY MR. BRENNAMAN:

4 Q. If you could look at paragraph 5 of the document?

5 A. I'm sorry, which page?

6 Q. Paragraph 5 starts on page 2 and goes to page 3.

7 Turning to page 3, the second full sentence, it  
8 states, "Ms. Bailey has also previously participated in  
9 staff-escorted privileges during which she engaged with  
10 female patients at the Minnesota Security Hospital."

11 Do you remember seeing any reference to that  
12 activity in her --

13 A. Yes.

14 Q. -- treatment records?

15 And this is an Affidavit of Jannine Hebert, who is  
16 the Clinical Director at MSOP. Are you --

17 A. Yes.

18 Q. -- familiar with Jannine --

19 A. Yes.

20 Q. -- Hebert?

21 She states at the end of her paragraph, number 5,  
22 "However, as Ms. Bailey's liberty increased, the heightened  
23 external stimulus resulted in increased sexually deviant  
24 fantasies that made her uncomfortable. Ms. Bailey  
25 subsequently requested to suspend these outings and MSOP

1 staff, due to safety concerns, agreed to this request."

2 Do you have any reason to believe that statement  
3 is not correct?

4 A. No.

5 Q. Is that reflected in the documents that you looked at?

6 A. No.

7 Q. You answered previously that the reference to  
8 staff-escorted privileges was -- was that referenced in the  
9 documents?

10 A. In the documents that I read?

11 Q. That you reviewed from Ms. Bailey's file.

12 A. Yes, uh-huh.

13 Q. Are you saying, then, that the subsequent part of not  
14 going on those outings anymore was not part of the records?

15 A. No, I'm aware -- I was aware of those escorts, and I was  
16 also aware of why they ended. And I wasn't surprised that  
17 she had those reactions.

18 Q. Okay. Well, it seems like the type of placements you're  
19 talking about, the confusing thing for me is that those  
20 placements seem to be of such a nature that it might lead to  
21 the same sort of external stimulus, increased sexual deviant  
22 fantasies, etc.

23 And so, was there any concern about that when  
24 moving her to a new placement?

25 A. There's concern particularly because she's not receiving

1 the treatment that would address that. So I didn't see in  
2 the records specifically that she's offered behavior  
3 treatment, for example, for deviant sexual arousal and  
4 deviant sexual interests. And so, those things need to be  
5 addressed in her treatment.

6 Q. You answered one of Mr. Gustafson's questions that they  
7 were taking no steps to protect her mental health. Is  
8 that -- is the program really taking no steps to protect her  
9 mental health?

10 A. I don't think I said no steps were taken to protect her  
11 mental health.

12 Q. Well -- I'm sorry, go ahead.

13 A. What I understood the question to mean was when she was  
14 transferred, was her mental health and treatment needs  
15 considered? And I said, no, that they weren't the primary  
16 consideration.

17 MR. BRENNAMAN: May I approach, Your Honor?

18 THE HONORABLE JUDGE FRANK: You may.

19 BY MR. BRENNAMAN:

20 Q. I put in front of you a document that's filed in this  
21 case, it's the Affidavit of Nancy Johnston. If you look at  
22 paragraph 3 of that Affidavit and please read that to  
23 yourself, I would like to ask you a question about it.

24 A. (Witness complied.)

25 Q. So, getting to this question of the administrative

1 change and why it was done, that paragraph notes two  
2 purposes. "Bringing all sexually-committed sex offenders  
3 together to provide specialized and consistent sex offender  
4 treatment" is the first reason, and "reducing potential risk  
5 posed to other not MSOP clients."

6 Do you -- are those valid bases for the type of  
7 movement that was made in your mind?

8 A. I think it's valid for some of the clients, but I don't  
9 think it applies to Ms. Bailey.

10 Q. And why not?

11 A. Because when referring to a consistent treatment  
12 program, she should be part of the treatment program applied  
13 to the hundreds of men; but an individualized program for  
14 her which could be provided elsewhere, as well as if the  
15 safety measures that MSOP has put in place at the MSOP were  
16 in place at the other facility, their concerns regarding the  
17 other clients would have been addressed there.

18 Q. When you interviewed Ms. Bailey, did you talk to her  
19 about the other clients in the Alternative Program, and in  
20 particular, her participation in group?

21 A. Yes.

22 Q. And what did she communicate about that?

23 A. I'd have to look at my notes, but one of the things that  
24 she talked about was that she gets in trouble -- I'm not  
25 sure if those are her exact words, because of some of the

1 men in her treatment, that there are boundaries meaning, you  
2 know, they flirt or they have -- I'm not sure how they're  
3 characterized, necessarily, but almost, you know, where she  
4 and a man on her unit or in her group are attracted to each  
5 other. And that gets her, quote, "in trouble."

6 Q. Did you get the sense that -- actually, turn back to  
7 Jannine Hebert's Affidavit. Paragraph 9, page 5.

8 Ms. Hebert, at the end of paragraph 9 on page 5,  
9 states that "Ms. Bailey has spoken eloquently of" -- this is  
10 Jannine Hebert's Affidavit, and she indicates that  
11 "Ms. Bailey has spoken eloquently of the benefits she has  
12 received from participating in group, this group referring  
13 to her fellow group members as her brothers."

14 Did you get the sense in your interview with  
15 Ms. Bailey that she derives support from the other male  
16 group members that she's with, at least from some of them?

17 A. I believe she does from some of them.

18 MR. BRENNAMAN: No further questions, Your Honor.

19 THE HONORABLE JUDGE FRANK: Mr. Gustafson?

20 MR. GUSTAFSON: Nothing further, Your Honor.

21 THE HONORABLE JUDGE FRANK: You may step down.

22 Thank you.

23 You may proceed with the next expert.

24 (Witness excused.)

25 MR. BRENNAMAN: The Defendants call Dr. Miner.



1 THE HONORABLE JUDGE FRANK: Why don't you go ahead  
2 and I'll have them bring out Mr. Eric Terhaar.

3 I'll just indicate before we begin that you're  
4 under oath from this morning, then we'll just -- wait just a  
5 moment, they'll be coming up shortly.

6 (Previously sworn.)

7 **MICHAEL MINER**

8 **CROSS EXAMINATION**

9 **BY MR. BRENNAMAN:**

10 Q. Dr. Miner, hello.

11 A. Hi.

12 Q. I would first like to ask you whether -- I know you were  
13 here listening to the testimony of the other Rule 706  
14 experts.

15 A. Uh-huh.

16 Q. And let's start with Dr. Robin Wilson.

17 Do you agree with his testimony?

18 A. For the most part. I mean, I would clarify along the  
19 lines of Ms. McCulloch that, in fact, the distinction  
20 between what is a -- I don't remember the terms -- the  
21 cursory versus the more thorough review is probably more  
22 semantic than actual, because we do spend a considerable  
23 amount of time with all of them.

24 I'd also kind of clarified that in general we're  
25 going through files in order to understand what's happening

1 within the program and be able to characterize it from the  
2 individual client perspective. And in doing that, we  
3 identify certain clients that we think either were in the  
4 wrong setting or were not having their needs met.

5 Q. Okay. But so far you've only been looking at the three  
6 programs, right? The alternative --

7 A. Right, we have not started to look at the general  
8 population.

9 Q. When do you anticipate that you'll start doing that?

10 A. I'm hoping -- I mean, I'm guessing sometime by the end  
11 of the summer.

12 Q. Okay. If you are to produce a general report on the  
13 entire program, though, would you have the opportunity to  
14 look at any files of any offenders who's not in one of those  
15 three groups?

16 A. I'm not sure that we would be able to do that. I mean,  
17 we have been focusing -- we've been focusing as was  
18 requested on the -- those who have juvenile-only offenses,  
19 those who are in the Assisted Living Program, those who are  
20 on the Mental Health Program and the Alternative Program.  
21 That's where we have been focusing so far in trying to kind  
22 of understand how those procedures -- how those particular  
23 clients are being treated -- or residents.

24 We have reviewed all of the documentation  
25 regarding the program, as a whole. We've also talked to

1 staff from administrators on down about the program as a  
2 whole.

3 So, I think we have a fairly reasonable idea of  
4 how the program is designed to work and in some cases how it  
5 is working. But, we certainly don't have the in-depth  
6 review of patient records. I mean, we have -- we have  
7 toured the facilities and we have talked to clients on the  
8 wards, units, whatever they're called. But, we probably  
9 will not have a random sample done when we present our  
10 report in August.

11 Q. Well, that's not what I was getting at. It sounds like  
12 from your testimony that you're telling me right now, you  
13 may not even look at any files that are not of individuals  
14 who reside in one of these three programs, the Young Adult  
15 Program, the Alternative Program and the Assisted Living  
16 Program?

17 A. I can't say that for sure. I can say that what our plan  
18 is at the moment, we have divided up those who were in the  
19 Young Adult Program, the Assisted Living Program and the  
20 Mental Health Program, and have reviewed those records. And  
21 that currently we have divided up those in the Alternative  
22 Program and we are going to be reviewing them prior to our  
23 visit in August. Where we go from there, I can't tell you  
24 today.

25 Q. Okay, but that review may take through the end of

1 August?

2 A. Probably -- no, I think we all planned to have the  
3 current patients that we've been assigned reviewed before we  
4 go to St. Peter at the beginning of August.

5 Q. And that would be all of the patients, then, in those  
6 three units?

7 A. Probably not all of them, but a good number of them.

8 Q. Okay. Would you agree with me that you can derive by  
9 looking at these files a sense of the treatment that's being  
10 provided to the committed individuals at the MSOP Program,  
11 right?

12 A. That by reviewing the file -- I mean, the information in  
13 the files provide a certain amount of information about  
14 what's happening with a particular individual and how a  
15 particular individual is responding. They're clearly not  
16 the end-all. They clearly don't provide you with all of the  
17 information about what's going on in treatment.

18 Q. But it does provide you with information about  
19 treatment? That was my question.

20 A. Certainly.

21 Q. And as I understand it, the general report that you're  
22 going to be producing at the end of August deals in part, at  
23 least, with the treatment that is provided by MSOP; is that  
24 right?

25 A. Certainly.

1 Q. Did you -- I'm sure you were attending to the testimony  
2 of Ms. McCulloch?

3 A. Uh-huh.

4 Q. Did you agree with her testimony regarding Ms. Bailey?

5 A. Yes. For the most part, yeah.

6 Q. Did you hear anything that you did not agree with?

7 A. No.

8 Q. I'd like to talk to you about Mr. Terhaar.

9 A. Is Ms. Bailey here? I think we should --

10 Q. I was just looking.

11 A. I think we should afford Mr. Terhaar the same privacy.

12 Q. I don't see her now, though. If she comes back, we'll  
13 take measures.

14 THE HONORABLE JUDGE FRANK: Which is right about  
15 now.

16 MR. BRENNAMAN: What's that?

17 THE HONORABLE JUDGE FRANK: It's right about now,  
18 Counsel.

19 MR. BRENNAMAN: Well, I was going to launch into  
20 questioning about Mr. Terhaar, so --

21 THE HONORABLE JUDGE FRANK: I think the concern is  
22 out of the same -- the concern that was raised earlier?

23 THE WITNESS: Right.

24 MR. GUSTAFSON: We agree, Your Honor.

25 MR. BRENNAMAN: No objection.

1 MR. GUSTAFSON: This testimony is going to be  
2 about Mr. Terhaar, so would you and Ms. Bailey, please step  
3 out of the room?

4 Thank you.

5 THE HONORABLE JUDGE FRANK: Thank you.

6 Whenever you're ready, Counsel.

7 MR. BRENNAMAN: Yes.

8 BY MR. BRENNAMAN:

9 Q. Did you review Mr. Terhaar's commitment records as a  
10 part of your review of his files?

11 A. Yes, I did.

12 Q. Do you believe that Mr. Terhaar should have been  
13 committed to MSOP?

14 A. No, I don't.

15 MR. BRENNAMAN: May I approach, Your Honor?

16 THE HONORABLE JUDGE FRANK: You may.

17 BY MR. BRENNAMAN:

18 Q. I just handed you two reports done before and at the  
19 time of Mr. Terhaar's commitments. One of them is from Dr.  
20 James Gilbertson and one of them is from Dr. Marshall.

21 Have you reviewed these reports?

22 A. Yes, I have.

23 Q. Do both of them opine that Mr. Terhaar meets the  
24 criteria for sexually dangerous person and sexually  
25 psychopathic personality? Do you agree with the conclusions

1 that these two doctors reached?

2 A. No, I don't.

3 Q. What is it that you don't agree with?

4 A. I believe that Dr. Marshall inappropriately used a  
5 variety of instruments that are designed for men who have  
6 committed adult sex crimes in reaching many of her  
7 conclusions about risk.

8 And I believe that Dr. Gilbertson, while not using  
9 those particular tools, again used risk factors that have  
10 been shown to predict sexual re-offending in adult  
11 populations, but have not been shown to predict sexual  
12 re-offending in adolescent or prepubescent populations.

13 Q. And what -- can you turn to page 7 of the report?

14 A. Which report?

15 Q. The Gilbertson report?

16 A. The Gilbertson report, okay.

17 Q. Dr. Gilbertson's report indicates that -- the first  
18 highlighted paragraph there, "It is my opinion that  
19 Mr. Terhaar's historical and dynamic risk factors clearly  
20 indicate that he is at high risk to sexually re-offend  
21 without further intervention and treatment."

22 Was it is wrong for Mr. Gilbertson to look at  
23 historical risk factors?

24 A. It depends on which historical risk factors you look at.

25 Q. Which ones should he not have looked at?

1 A. Well, the research with individuals who commit crimes as  
2 juveniles, basically indicate that the factors that predict  
3 re-offense don't necessarily predict sexual re-offense, but  
4 are about delinquency. And so those factors that are  
5 related to delinquency are reasonable in terms of predicting  
6 juvenile delinquent behavior, but are not useful in  
7 predicting adult offending behavior.

8 Those factors that have been used for adult  
9 offending behavior generally are not useful when looking at  
10 juveniles, because they just don't apply.

11 Q. Is Mr. Gilbertson's report detailed enough for you to  
12 tell whether he looked at, in your opinion, the correct  
13 historical factors, but not the incorrect historical  
14 factors, risk factors?

15 A. I believe I've actually highlighted that, so let me go  
16 back and look.

17 Oh, yes. So, what we have here, it's all on  
18 page 6. He's outlining the factors that he's looked at.  
19 And what you see is that those that are highlighted, in  
20 general -- in general, what these are, again, are general  
21 delinquency risk factors and not specific to sex offending.  
22 And there's no available research that ties any of these  
23 particular factors -- there's nothing in this research that  
24 would indicate that someone whose sexual offenses occurred  
25 between the ages of 10 and 14 would then be a risk as an



1 adult. The research doesn't support making that leap, which  
2 is what Dr. Gilbertson has done.

3 Q. Tell me about the dynamic risk factors. And is it  
4 inappropriate to look at dynamic risk factors when --

5 A. I think these are a combination of both static and  
6 dynamic risk factors. I mean, again, I think we're caught  
7 in -- I think in making this determination, it's hard to  
8 look at dynamic risk factors with an individual who has been  
9 in controlled settings through most of their adolescence.

10 Q. But isn't it relevant that even in controlled settings,  
11 Mr. Terhaar has -- is a frequent -- and we can get into this  
12 later in the testimony -- frequent rule breaker, assaultive  
13 behavior, and so on and so forth?

14 A. I mean, there are certainly concerns about his behavior  
15 and how he -- and his interpersonal interactions and his  
16 interpersonal skills, and all of those are of concern and  
17 may, in fact, be of concern if you are looking at a  
18 generalized concern about antisocial behavior. But, if  
19 we're talking particularly about sexual acting out, the data  
20 doesn't support these as particular risk factors for  
21 sexually acting out.

22 Clearly, Mr. Terhaar was a troubled youth and has  
23 had many problems in his placements. I think part of the  
24 problem here is that very early in life, he was identified  
25 as a, quote, "sex offender" and channeled into a series of

1 interventions that may not have been appropriate for his  
2 particular treatment needs.

3 Q. With the second highlighted paragraph there -- I'll just  
4 read from it -- "I did not see him as available for an  
5 outpatient sex offender treatment program."

6 Do you have any basis upon which to dispute that  
7 sentence? Do you know what type of outpatient sex offender  
8 treatment programs were available which led Dr. Gilbertson  
9 to make that statement?

10 A. I would agree that there was not an available outpatient  
11 sex offender treatment program. I would also say that I  
12 don't think there was a need for an outpatient sex offender  
13 treatment program.

14 Q. And what was there a need for?

15 A. There is a need for a program to address his childhood  
16 trauma, to address his abandonment issues, to address his  
17 inability to interact in social situations, to provide an  
18 environment that was supportive and allowed him to learn  
19 adequate skills to be self-sufficient and live in the  
20 community.

21 Q. Beyond that --

22 A. Excuse me.

23 Q. I didn't mean to cut you off. I thought you were done.

24 A. That's all right.

25 Q. What type of program would that have been? Was he in

1 need of -- before I ask that question, the second sentence,  
2 then, "He has been unable to sustain himself in a  
3 residential community placement." You agree, don't you,  
4 Doctor, from looking at his records, that he had a hard time  
5 maintaining placements because of his assaults, absconding,  
6 all sorts of issues?

7 A. Yeah, he had a very rough time in placement, as a child  
8 and as an adolescent.

9 Q. And so the type of placement that you saw would have  
10 been appropriate for him, would it have been another  
11 residential placement? Would it have been another  
12 structured setting? And how would that have happened? He's  
13 now 19 and he's 19 when this is happening.

14 A. Right. I don't know what is available at that point. I  
15 know that in Minnesota, a lot of juveniles -- a lot of folks  
16 age out of the juvenile system and most of them are not  
17 civilly committed. So, I assume that there are programs and  
18 there are processes that help these young men.

19 And I think something could have been developed.  
20 I don't know exactly what it would be. It's certainly --  
21 drawing on some of the work from multisystemic therapy, we  
22 know how to intervene on serious juvenile delinquency  
23 problems, although I'm not clear that's what was going on  
24 here, either.

25 Q. And so, he is committed?

1 A. Right.

2 Q. He's committed to MSOP. And the Defendants in this  
3 case, you understand, are the individuals who operate the  
4 Minnesota Sex Offender Program, right?

5 A. Right.

6 Q. So you understand that they were not involved in the  
7 commitment of Mr. Terhaar, but they received him upon  
8 commitment; do you understand that?

9 A. Yeah. No, I understand that, yes.

10 Q. In your experience, is it the role of a clinician upon  
11 receiving a committed individual -- well, are you a  
12 clinician or are you an academic? Can I ask you a little  
13 more about your qualifications?

14 A. Yes and yes.

15 Q. You are both?

16 A. I am both. Yes, I do have a clinical practice.

17 Q. Thank you.

18 In your experience, is it the role of a clinician  
19 upon receiving a committed individual to second-guess the  
20 legal determination made by the Judge that the particular  
21 individual should be committed?

22 A. The role of a clinician in receiving a patient is to do  
23 a thorough assessment and determine what their needs are and  
24 whether they are appropriately placed. And in a setting  
25 such as this, whether they are appropriately placed does

1 involve a review of what the Court chose to do.

2 Q. So, in your view, then, was it MSOP's duty, upon  
3 receiving Mr. Terhaar, to do that type of thorough  
4 assessment, and if they did believe that he had been  
5 inappropriately committed, to petition for his discharge?  
6 Is that what should have happened in your mind?

7 A. I would certainly -- I mean, I know that that's not what  
8 was done, but I think it would -- I think it's a reasonable  
9 practice that if someone comes in your front door that you  
10 do not believe should be there, that you do what you can to  
11 rectify that.

12 Q. Okay. Is it also their duty to treat him?

13 A. As best they can, certainly.

14 Q. And do you feel that they have been treating him as best  
15 they can?

16 A. I think he's benefited from what he's received. I think  
17 there are major holes in the treatment that he has received.  
18 I don't -- as I said, I don't believe that sex offenders'  
19 specific treatment as defined by MSOP and by many of us in  
20 the field is really the best intervention for someone like  
21 Mr. Terhaar.

22 But, you know, so with those caveats, I think  
23 they've done -- you know, he certainly has benefited from  
24 his time there. He has matured. Now, whether he would have  
25 matured -- whether his maturation would have been different

1 and quicker and whether he would have learned more if he was  
2 in a community setting versus MSOP is something that we  
3 could discuss or conjecture.

4 Q. Can I go back to some testimony we heard before from  
5 Dr. Wilson about the standard that's applied when you're  
6 looking at these files and these issues?

7 A. Sure.

8 Q. When you look at a file --

9 A. Uh-huh.

10 Q. -- on instructions of the Court, what standard are you  
11 using? I, again, note that on Mr. Terhaar's  
12 recommendation --

13 A. Right.

14 Q. -- it uses the language of Chapter 253D. Are those the  
15 standard that you had in mind?

16 A. We're not looking specifically at the standards set out  
17 by statute for discharge from MSOP. What we are looking  
18 at -- at least what I'm looking at, I won't speak for all  
19 four of us -- what I'm looking at is the reasonableness of  
20 what has been done here, and the extent to which a  
21 particular -- you know, the extent to which the intervention  
22 is being provided or appropriate for what the needs are that  
23 are expressed in the various reports that are available to  
24 me.

25 The extent to which -- in looking at the initial

1 reports, they appear to adequately address the statutory  
2 issues, and at this point, to what extent does this  
3 individual need the level of confinement that exists at the  
4 MSOP.

5 Q. The Rule 706 experts' use in their report on Mr. Terhaar  
6 the language, "unconditional discharge." From a clinical  
7 perspective, would it be advisable to send Mr. Terhaar  
8 unsupported into society given his institutionalization for  
9 --

10 A. We are in no way suggesting that Mr. Terhaar would not  
11 benefit and does not need supports. In fact, we believe  
12 that he does. What we do not believe he needs are  
13 conditions.

14 Q. And what's the difference in your mind?

15 A. Supports are those services that will allow him -- that  
16 will move him forward and allow him to meet his needs, to  
17 grow emotionally, psychologically, socially, that will help  
18 him adequately adapt to the community that will help him  
19 move forward in life. Conditions are things that can get  
20 him violated back into the system.

21 Q. Okay. And by -- conditions are used in a provisional  
22 discharge-type situation, isn't that right? Is that what  
23 you're referring to?

24 A. Well, they are used in a provisional discharge, yes.

25 Q. And the reason for those, as I understand it, and I'd

1       like your view, is to be able to insure that a transition --  
2       ensure the behavior, the compliant behavior of an individual  
3       who is under those conditions because of the threat of  
4       bringing back, isn't that right?

5       A.   It's about compliance, yes.

6       Q.   And would you agree with me that if there's no  
7       conditions, if unconditional discharge happens, that the  
8       Department is going to have no way of controlling  
9       Mr. Terhaar's behavior? That's the entire point of a  
10      provisional discharge.

11      A.   Exactly, exactly.

12      Q.   I'd like to get into what type of support structure and  
13      treatment you believe Mr. Terhaar will need in the event  
14      that he is unconditionally discharged. Maybe let's talk in  
15      terms of just the basics. Housing?

16      A.   He certainly needs a support place to live. He needs to  
17      be able to develop supportive family and friends. He would  
18      benefit from psychotherapy to help him address his trauma  
19      issues and put his issues with anger into the context of his  
20      developmental traumas. He certainly needs vocational  
21      training that will help him -- or at least help in obtaining  
22      employment. And some type of case management wouldn't be a  
23      bad thing, either.

24      Q.   And who should provide that case management?

25      A.   Again, I would assume that the county or local



1 jurisdiction has some mechanism to do that.

2 Q. What's involved in case management? Is that just a  
3 resource to Mr. Terhaar or is that someone who checks up  
4 and --

5 A. I would view it as a resource for Mr. Terhaar to help  
6 him marshal all of things that he needs.

7 Q. There's been a suggestion with the housing that he might  
8 live with his father --

9 A. Uh-huh?

10 Q. -- would that be an appropriate housing placement? I  
11 guess I'd like to ask you short-term, but long-term?

12 A. I think short-term, it's very appropriate placement. I  
13 think like any young man, he will be working towards much  
14 more independent living, I think. Yeah, so --

15 Q. How about long-term?

16 A. Long-term, one would hope that Mr. Terhaar learns -- is  
17 able to support himself, to, you know, learn to do the basic  
18 things that we all need to learn to do to live on our own,  
19 and that he ultimately will be able to do that. And he  
20 will, of course, require some help in doing that.

21 Q. You interviewed Mr. Terhaar, is that right?

22 A. Yeah, we did that as a group.

23 Q. Did he say where he wanted to live at that point?

24 A. He indicated that he would like to live with his -- with  
25 his father.

1 Q. I'm sorry?

2 A. He said he indicated that he'd like to live with his  
3 father, his adoptive father.

4 Q. And we're hoping to hear from Mr. Terhaar -- Eric  
5 Terhaar's father --

6 THE HONORABLE MAGISTRATE JUDGE KEYES:

7 Mr. Brennaman, could you raise your voice a little bit? My  
8 hearing is not as sharp as Judge Frank's, so -- maybe toward  
9 the end of the day, too, i think we're --

10 THE HONORABLE JUDGE FRANK: And I'm sure my Court  
11 Reporter is going to thank you, Judge Keyes, the mikes  
12 aren't the best there.

13 MR. BRENNAMAN: I can't -- I'm sorry, Your Honor.  
14 May I approach?

15 THE HONORABLE JUDGE FRANK: You may.

16 BY MR. BRENNAMAN:

17 Q. I'm showing you what has been marked as Exhibit No. 103.  
18 This is a report of the end of confinement review committee  
19 and this just occurred -- the meeting date was July 7th in  
20 this report. I don't now see if it's dated, but it came out  
21 after that.

22 Could you turn to the second page for me and read  
23 the last paragraph on the second page?

24 A. Last paragraph. "His adoptive father's residence is a  
25 possible placement if returned to the community. Living in

1 that residence is a brother and another sibling who  
2 Mr. Terhaar is not certain which sibling it is; both are  
3 adults. It's unknown if those living with his adoptive  
4 father were Mr. Terhaar's victims. Mr. Terhaar does not see  
5 his father's residence as a realistic  
6 possibility/opportunity if released back to the community,  
7 stating he does not have the living skills for being in  
8 society as a result of being institutionalized most of his  
9 life. A group home or halfway house is a place he could  
10 learn the skills he needs to live in society."

11 Q. Is that description consistent with the conversation you  
12 had with him during the interview?

13 A. Consistent with the conversation we had with  
14 Mr. Terhaar?

15 Q. During your interview with him.

16 A. When we -- my recollection of that interview is that he  
17 was talking about residing with his father upon release.

18 Q. Maybe we'll get more clarification on that as the  
19 hearing goes on.

20 In terms of treatment and care, continuing  
21 treatment and care of Mr. Terhaar, is any needed? And if it  
22 is, could you explain that?

23 A. Yeah, again, I think we're talking about an individual  
24 who has been, you know, in some kind of residential  
25 placement pretty much since he was 14 years old. You know,

1 we're now ten years later. He certainly is going to need  
2 support to learn to live in the community. One of the  
3 positions -- one of the jobs I had when I worked in  
4 California was to do one year follow-ups from guys that were  
5 released from Atascadero State Hospital. And I think one of  
6 those men describes the adjustment to the community the best  
7 of anyone that I've ever experienced. He looked at me and  
8 he said, "You know, Mike, it wasn't the big things. It  
9 wasn't the housing. It wasn't the employment. It was the  
10 little things." He said, "I went to the pharmacy with my  
11 used tube of toothpaste and they wouldn't give me a new  
12 one."

13 And I think that describes the process, for me,  
14 better than anyone, better than I could do it myself.  
15 It's -- of course, anyone coming out of an institution is  
16 going to need the supports and the -- to learn to live  
17 outside of an institution, how to do the little things, how  
18 to cook a meal, how to go to the grocery store, how to use a  
19 cell phone. You know, money comes out of the wall, now. It  
20 didn't come out of the wall many years ago. So, there are  
21 all of these little things that are going to be required.

22 And then there's the psychological factors that  
23 have caused him problems in the past. And if left  
24 untreated, are likely to cause him problems in the future.  
25 And those need to be addressed through probably individual

1 psychotherapy, maybe group psychotherapy.

2 Q. Is there any other type of treatment he might need to  
3 address those issues?

4 A. I'm not quite sure what you mean.

5 Q. Well --

6 A. I mean --

7 Q. -- you mentioned two. Is that it?

8 A. Well, certainly looking at -- you know, looking at  
9 psychiatric issues, looking at medication issues, there may  
10 be some health issues given that there's some indication of  
11 an atypical fetal alcohol syndrome.

12 We certainly want to look -- you certainly want to  
13 have someone take a look at how that's going to impact his  
14 behavior and provide him with some skills to deal with that.  
15 So, yeah, there are things that need to be done.

16 Q. Well, and I guess the question is, who is responsible  
17 for doing those things? Would you agree with me, for  
18 example, that if he is unconditionally discharged, MSOP is  
19 not going to be able to insure that he goes to his treatment  
20 sessions, for example?

21 A. Right. If he is unconditionally discharged, MSOP will  
22 not be able to compel him to do things.

23 Q. And won't be able to compel him to take his medications,  
24 won't be able to compel him to act in a manner that's  
25 consistent with public safety, won't be able to compel him

1 --

2 A. Well, and I agree that they will not be able to compel  
3 him to do these things. I think our opinion is that he is  
4 in a place where he will -- that he more likely than not  
5 will do these things and he does not need to be compelled.

6 Q. Sure. And he -- you know by now from listening today  
7 and I'm sure you knew beforehand, that the position of the  
8 Department is, instead of unconditional discharge, to  
9 transfer Mr. Terhaar and work through the transition issues  
10 through -- would you agree with me that the community  
11 preparation services is the environment and the tool that  
12 MSOP has to affect a transition?

13 A. That is their program for transition, yes.

14 Q. And do you see their petition for Mr. Terhaar into that  
15 program as their way that they have the ability to  
16 transition someone back into the society?

17 A. Well, it's the program that they have in place to  
18 transition folks back into society. How effective it is  
19 seems up in the air.

20 Q. Would you agree with me that if Mr. Terhaar is  
21 unconditionally discharged, though, MSOP does not have these  
22 tools available to them to help with his transition into  
23 society?

24 A. I think the problem that we're talking about here is  
25 kind of going back to Ms. McCulloch's statement, that

1 release planning needs to start at the beginning of  
2 treatment and not wait until the end.

3 So, what you're talking about here is that there  
4 has been no plan in place or plan developed over the five  
5 years that Mr. Terhaar has been in treatment; and therefore,  
6 we are left to try to understand how we're going to do it if  
7 the Court decides that he should be.

8 Q. What's your recommendation? I know that the father has  
9 indicated that is willing to provide --

10 A. Uh-huh.

11 Q. -- some support, and we may hear more about that --

12 A. Right.

13 Q. -- as this hearing goes on.

14 Beyond that, I don't know. I mean, MSOP is  
15 willing to provide some aftercare. We put in a filing that  
16 indicates that; but, it's limited, as we've been talking  
17 about, because if he's unconditionally discharged, they  
18 don't have the power to --

19 A. Right.

20 Q. -- enforce anything.

21 So, who is going to teach Mr. Terhaar the regular  
22 everyday things? I mean, is this known to you?

23 A. I'm not that familiar with the specific services  
24 available. I do have clients that are -- you know, that  
25 receive job placement services through their counties of

1 residence. I have clients who are in supervised living  
2 situations through their counties of residence. Certainly,  
3 there are mental health services available, so I think there  
4 are social services available through counties of residence.

5 Q. Have you communicated with the county at all about  
6 Mr. Terhaar?

7 A. I have not.

8 Q. I'd like to talk more about treatment that he is  
9 receiving at the Minnesota Sex Offender Program -- is this  
10 reverberating, or is that just me?

11 A. I heard something reverberate back, as well.

12 Q. Is Mr. Terhaar's placement in the Young Adult Unit of  
13 the Minnesota Sex Offender Program appropriate?

14 A. I think given that he is in the Minnesota Sex Offender  
15 Program, that that is the best placement for him.

16 Q. What do you understand is the purpose of that unit?

17 A. You know, I can't speak articulately about it, but it's  
18 to provide -- my understanding is that it's to provide the  
19 younger residents with a supportive environment, and in some  
20 respects to protect them from the general population, to not  
21 put them -- not to put them in kind of a sink or swim into  
22 the general population.

23 Q. There's been some suggestion that, you know, what a bad  
24 thing it is that these young adults are being thrown into  
25 this program with other sex offenders, and the idea is that



1 maybe they fall prey to the other sex offenders. Is there  
2 any evidence in Mr. Terhaar's record that that has happened  
3 to him and that he's been victimized or threatened by other  
4 clients at MSOP?

5 A. I think so, but I can't tell you exactly. I have read  
6 through the record, but I don't recall a specific incident.

7 Q. Okay. Well, what makes you think so?

8 A. I thought that -- I just have this kind of a recall of  
9 a -- of some discussion around threats and maybe sexual  
10 coercion from another client. But, again, I'm not totally  
11 positive on this and I don't want to run to the bank with  
12 it.

13 Q. Well, if you remember, let me know.

14 A. Yeah.

15 Q. We will be going through, later, some specific examples,  
16 as well. So, maybe that will refresh your recollection.

17 A. Okay.

18 Q. So, you said before that E.T. is receiving treatment at  
19 MSOP. Is he improving, at least in part, because of that  
20 treatment he's been receiving?

21 A. I mean, he certainly in his interview, you know, told us  
22 of the benefits that he believes he's received from being in  
23 treatment from MSOP. I think the records indicate some  
24 improvements in impulsivity, in anger management, and kind  
25 of understanding some underlying issues that lead to his

1 behavior. So, yeah, certainly, I think he's benefited from  
2 some of what he -- that he has had some benefit from what he  
3 has received.

4 MR. BRENNAMAN: May I approach, Your Honor?

5 THE HONORABLE JUDGE FRANK: You may.

6 BY MR. BRENNAMAN:

7 Q. I just handed you the report on Eric Terhaar dated  
8 May 18th --

9 A. Uh-huh.

10 Q. -- 2014.

11 This is the report that you and the three other  
12 experts offered --

13 A. Right.

14 Q. -- is that right?

15 A. Yes.

16 Q. The report suggests that he has been able to regulate  
17 more effectively his behavior and emotions. Is that in part  
18 due to the treatment he has received at MSOP?

19 A. I am sure that it is in part due to the treatment he's  
20 received at MSOP.

21 Q. I understand there are some criticisms about not  
22 incorporating trauma-informed care in your report, but  
23 besides that and besides -- I know you object in general to  
24 the placement and the secured treatment facility; but, aside  
25 from those things, is the treatment that MSOP is providing

1 appropriate for Mr. Terhaar?

2 A. I don't think so, no.

3 Q. Tell me why.

4 A. I think it is sex offender-specific treatment. It  
5 involves looking at cycles and being -- and specifically  
6 looking at one's sexually-offending behavior and taking  
7 responsibility for that.

8 And again, I would say that we're talking about  
9 the behavior of a 10-year-old. And to characterize the  
10 behavior of a 10-year-old in the same way as the behavior of  
11 a 35 year-old seems to me to be inappropriate. And to  
12 provide a structured sex offender treatment program to  
13 someone whose sexual-offending behavior was done at the age  
14 of 10 seems to me to be inappropriate. Which is not to say  
15 that he doesn't benefit from some of what he is offered.

16 Q. What treatment is he receiving that's helping him  
17 regulate his behavior and emotions?

18 A. Well, I'm guessing there are some modules that are  
19 addressing anger management, and there are some modules that  
20 address kind of general behavioral control. And I'm sure  
21 that those are helpful.

22 Q. Well, you say you're guessing. I mean, you have  
23 reviewed Mr. Terhaar's file, right?

24 A. Right.

25 Q. Have you seen --

1 A. I mean, there are modules in the program that address  
2 those things and he has benefited from doing those things.

3 MR. BRENNAMAN: What time did the Court intend to  
4 go to? I was going to launch into a new sort of  
5 exhibit-intensive line of questioning.

6 THE HONORABLE JUDGE FRANK: What -- Mr. Gustafson  
7 is standing, I was about to ask opposing counsel how much  
8 time he'd estimate he had left.

9 What were you going to say, Mr. Gustafson?

10 MR. GUSTAFSON: I was going to say that I thought  
11 we should really try hard to finish these 706 experts today  
12 so they don't have to stay over.

13 THE HONORABLE JUDGE FRANK: Well, they're staying  
14 over either way. I think one or more has a noon deadline  
15 tomorrow to be on an airplane. But, they're staying over  
16 either way.

17 About how much time do you have left, do you  
18 estimate, ballpark?

19 MR. BRENNAMAN: I may have a half an hour left.

20 THE HONORABLE JUDGE FRANK: Yeah, I think what  
21 we'll do is -- and that way, we can take a couple of things  
22 up with counsel, we'll recess here.

23 I think I understood correctly through Mr.  
24 Ferleger and others that -- I think one of you had the noon  
25 deadline tomorrow, but you were all planning on staying and

1       enjoy this unseasonably cold weather here in Minnesota.

2               THE WITNESS:   And I am local, so --

3               THE HONORABLE MAGISTRATE JUDGE KEYES:   What  
4       witnesses do you anticipate calling, Mr. Brennaman, after  
5       the experts?

6               MR. BRENNAMAN:   We would like to call Mr. Terhaar  
7       and Ms. Bailey just for some short testimony.   We'd like to  
8       ask what their preferences are.   I think that's appropriate  
9       in this type of proceeding, and ask some other questions.  
10      But, I don't expect that to take very long at all.

11              We wish to call Nancy Johnston and Jannine Hebert  
12      to articulate the Department's position on transfer of  
13      Ms. Bailey and discharge of Eric Terhaar.

14              And then possibly, depending on the time, we have  
15      some other clinical people who can talk in more detail about  
16      the treatment that is being given to Ms. Bailey and Mr.  
17      Terhaar, but that's sort of time permitting.

18              I'd also like to hear from Mr. Terhaar's father,  
19      there's this issue of support that we're grappling with here  
20      and I think it would be nice to hear from him.

21              THE HONORABLE MAGISTRATE JUDGE KEYES:   How about  
22      you, Mr. Gustafson?   Hearing that, are you going to have any  
23      other witnesses other than cross-examining or examining  
24      those witnesses?

25              MR. GUSTAFSON:   The only witnesses that he didn't

1 mention that I thought would testify are his experts who say  
2 that Mr. Terhaar and Ms. Bailey should not be transferred.  
3 They have an independent expert, Dr. --

4 THE HONORABLE JUDGE FRANK: Powers-Sawyer?

5 MR. GUSTAFSON: Yes, and Dr. Ann Pascucci who did  
6 the risk assessment with Dr. Laura Herbert. So, if they  
7 don't call them, we may call them. Otherwise, I think that  
8 that probably covers it.

9 THE HONORABLE JUDGE FRANK: So then knowing that  
10 we had two days set aside, is it realistic as we leave here  
11 this afternoon that we will conclude by five o'clock  
12 tomorrow?

13 MR. GUSTAFSON: I believe it is realistic,  
14 Your Honor. I thought we'd get farther today.

15 MR. BRENNAMAN: It might be a little tight,  
16 Your Honor, but we can try.

17 (Discussion off the record.)

18 THE HONORABLE JUDGE FRANK: You may step down,  
19 then. We'll stand in recess for all the folks in the  
20 courtroom until 9:00 tomorrow morning. We would like to  
21 visit at sidebar with counsel before you leave, here. We'll  
22 let kind of the folks exit. And -- I'm sorry, come in --  
23 thank you -- at 9:00 tomorrow morning.

24 But, check in with us before everybody leaves,  
25 because one of our questions to counsel may affect who's

1 here tomorrow and who's not.

2 (Witness excused.)

3 THE MARSHAL: You want me to bring her in?

4 THE HONORABLE JUDGE FRANK: Okay, that's fine.

5 Before your clients leave, we probably would like  
6 to talk with counsel up here.

7 (At the bench.)

8 THE HONORABLE JUDGE FRANK: The inquiry that we  
9 have, and you can follow up in case you have any, is  
10 separate from the issue of whether you want the two  
11 Plaintiffs here, we are trying to understand what the  
12 relevance would be of calling either Ms. Bailey or  
13 Mr. Terhaar.

14 Neither one of us can -- and I can't envision any  
15 circumstance for what they have to say is particularly, in  
16 light of -- either they said what they said to the experts  
17 and the other staff that may be called or they didn't. What  
18 they would -- what they would have to say, it would not be  
19 outcome determinative in any way.

20 MR. GUSTAFSON: Your Honor, we didn't intend to  
21 call them. We don't think their testimony has any  
22 relevance. What they think or what they want is irrelevant.  
23 They're under commitment by Court Order. And whether they  
24 satisfy the constitutional standards and all the rest of it  
25 doesn't have anything to do with what they want, what they

1 think, where they're going to live or anything else.

2 MR. BRENNAMAN: I guess I disagree. I mean, it's  
3 customary in the state law process to hear from committed  
4 individuals to hear what they're thinking, what they think  
5 about their placement, their treatment, what they  
6 understand.

7 You know, in this case, we have Mr. Terhaar, we  
8 have testimony now that's completely contradictory about  
9 what he wants, where he wants to stay. He told them in the  
10 interview, the experts, that he wants to stay with his  
11 father. He's told the ECRC Board, apparently, that he  
12 didn't want to live with his father and that he felt like he  
13 needed to be in a structured situation like a halfway house  
14 or something like that.

15 So, where is he going to stay? What are the  
16 conditions going to be? What does he want?

17 THE HONORABLE JUDGE FRANK: Let me suggest this  
18 and you can follow up. I almost raised this at the last  
19 hearing. It seems like there's a constitutional disconnect  
20 here because it seems to me that the real issue is the  
21 constitutionality issue with respect to their confinement.

22 And really, it really becomes a problem for the  
23 Court, not them, not you, but the Court and what happens, if  
24 anything, if we come your way on that, because then we have  
25 motions for aftercare, we have motions that -- really, what



1 the Dad thinks or either of these people think really don't  
2 have much to do with anything. Because on the assumption  
3 that if we came your way on the confinement issue, that  
4 we're going to then go ahead and make a decision without  
5 some -- an extensive evaluation of, well, what are the -- I  
6 mean, there are a number of cases around the country where,  
7 in those rare cases where the judge stepped in in a 1983  
8 context, not habeas, that there was a -- they had to  
9 evaluate, well, where do we go from here? Because the  
10 likelihood that no matter what Dad says or Mr. Terhaar says  
11 that the Court's going to say: You're on your own, now.  
12 It's not going to happen, whether we have to face that issue  
13 here or down the road with one or more Class members.

14 But Judge Keyes?

15 THE HONORABLE MAGISTRATE JUDGE KEYES: It seems to  
16 me that my concern is that the real core issue here with the  
17 experts saying is -- and the issue is, is he dangerous  
18 and/or is she dangerous? I mean, that's really the core in  
19 terms of can you continue to confine somebody if you  
20 conclude that they're not a danger?

21 I don't see how -- I don't see that it would be  
22 anything productive to try to cross-examine these two  
23 individuals about their dangerousness. I take it that's not  
24 what you intend to do.

25 MR. BRENNAMAN: No. Well, I think we would get

1 into it, though, if he denies -- you know, I think these  
2 experts downplay his assaults that he committed at MSOP. I  
3 mean, we would ask him about those. And then if he wouldn't  
4 admit to them, we would put in evidence and ask him to  
5 explain what was causing that.

6 We didn't, and I think he would admit to it, and  
7 maybe have a story to tell about how he's getting better.  
8 But, I think some evidence on dangerousness would be in  
9 order on him --

10 MR. GUSTAFSON: I totally disagree, Your Honor.  
11 This is not an issue. This is an issue in which the State  
12 takes the position all the time that this is a matter of  
13 expert testimony. The person at the SRB hearing is not put  
14 under oath. Eric Terhaar was not put under oath at the SRB  
15 hearing.

16 MR. BRENNAMAN: Was anybody?

17 MR. GUSTAFSON: No, nobody was put under oath. He  
18 was not asked questions about his behavior. He's not asked  
19 questions about -- he is asked questions about his aftercare  
20 plan.

21 There is nothing in this hearing that requires the  
22 testimony of either of these individuals. And the State  
23 just wants to call into question whether the experts did an  
24 adequate review. That's what cross-examining of the experts  
25 is for.

1           If Eric Terhaar denies that he got into a fight on  
2           January 5th of blah, blah, blah, a year ago, are they going  
3           to call somebody from the MSOP to testify to the fight?

4           THE HONORABLE JUDGE FRANK: I assume these things  
5           are either in the records or they're not.

6           MR. GUSTAFSON: They are in the record. There's  
7           just no reason to have this testimony.

8           THE HONORABLE MAGISTRATE JUDGE KEYES: And I don't  
9           think there's any fact dispute or contest about whether  
10          those incidents occurred. They're all a matter of the  
11          history that's in the record, right?

12          MR. GUSTAFSON: If they call him, we're going to  
13          challenge whether some of those things are accurate; but,  
14          there's no real need to. The experts had his file. They  
15          considered it. And they still think he doesn't satisfy the  
16          standard to be held. So, I don't think it adds anything to  
17          it, whether he denies it or agrees to it.

18          MR. BRENNAMAN: Well, I'm thinking of one issue  
19          that might come up is the issue of, you know, they downplay  
20          his sexual offense history after age 14; but, at age 17, he  
21          was masturbating in a car next to a 4-year-old granddaughter  
22          of his foster mom.

23          Now, he claims he was just adjusting himself and  
24          they seem to have taken that on face value that he was just  
25          adjusting himself. Well, the fact is, he admitted to it

1 later, and I think he'd admit to it now.

2 MR. GUSTAFSON: Well, you know, that's an issue  
3 you should have taken up with the experts, and maybe you  
4 will tomorrow with the experts, because they're the ones who  
5 you're actually questioning their opinion --

6 MR. BRENNAMAN: Yeah, and they'll say we think he  
7 adjusted himself.

8 THE COURT: One person at a time, please.

9 MR. BRENNAMAN: And how do I contradict that if I  
10 don't have Eric Terhaar --

11 MR. GUSTAFSON: My point is that you should ask  
12 the experts that first, because they'll tell you it doesn't  
13 make any difference. And then it won't make any difference.  
14 That's why I think that this testimony should not be  
15 allowed.

16 I mean, if you want to -- if you want to reserve  
17 judgment, Your Honor, until after the experts have  
18 testified, I suspect we could do it that way, but in the  
19 end, I think that I could elicit testimony from all four of  
20 the experts that any of these minor factual disputes that  
21 counsel for the State is talking about don't matter in their  
22 opinion. That even if he did -- even if he was masturbating  
23 in the back seat of the car at age 17, he wasn't an  
24 adjudicated delinquent for it. And it wouldn't change their  
25 opinion. That's the question that should be asked of the

1 experts.

2 But in any event, I don't think that E.T. --  
3 Mr. Terhaar or Ms. Bailey can offer a single thing to the  
4 question of whether their 1983 claim on a constitutional  
5 violation has validity.

6 THE HONORABLE JUDGE FRANK: Let me ask you this  
7 before I hear from counsel.

8 Can I assume that apart from whether there was any  
9 intent of anybody to call them, that you felt it was  
10 important they be here? Or was it over your objection, or  
11 do you have a view?

12 MR. GUSTAFSON: No, no, we agreed to have them  
13 here. We both talked about whether we might call them or  
14 not, and it wasn't clear to me now. Now, I just don't see  
15 it as necessary, but we wanted him to be here to see the  
16 process, in any event.

17 THE HONORABLE JUDGE FRANK: Judge Keyes, it seems  
18 to me that we could -- even though I think it's going to be  
19 an uphill battle, and I don't think irrespective of anything  
20 they say it's going to be outcome determinative one way or  
21 the other, because the experts and the records are what they  
22 are and this is not a commitment hearing.

23 But one suggestion you had since you're going to  
24 be here anyway tomorrow is let's see when we're done with  
25 the experts and where the AG's Office is at, where you're

1 at, and then -- and the scope of the examination, then, in  
2 fairness to -- since this is the first you've heard this  
3 from us, we can take that up without delaying anything  
4 tomorrow when the context of it is clear to both of you,  
5 without agreeing --

6 THE HONORABLE MAGISTRATE JUDGE KEYES: One of the  
7 things I think that we have to consider, we'll all have to  
8 consider is the traumatization of these individuals to be in  
9 a Federal Court and to be examined about these things in  
10 public.

11 And while it may -- if it was always -- if it was  
12 essential or necessary to a case, that's one thing. But, if  
13 it's not, then whatever responsibility we have to further  
14 harm them by simply exposing them to examination that may  
15 not be necessary, I think that to me, anyway, it would have  
16 to be a high threshold showing that it was necessary.

17 MR. GUSTAFSON: And I think that's particularly  
18 true for Ms. Bailey, as opposed to Mr. Terhaar. I mean, I  
19 think she's much more vulnerable in that regard for obvious  
20 reasons in the file.

21 THE HONORABLE JUDGE FRANK: If the reports are  
22 semi-accurate on her about her intellectual disability, I  
23 have doubts how much she even understood today. But, I  
24 guess we will leave that -- what I've read about her mental,  
25 apart from the sex offense issue.

1 MR. BRENNAMAN: We're sensitive about, Your Honor,  
2 the stress that this puts on them, and so on. Especially, I  
3 agree with respect to Ms. Bailey. That is why we only had a  
4 few questions for her. We just want to know about her  
5 situation, whether she feels safe, where she wants to be,  
6 you know, and then she's off the stand. And even if that's  
7 too stressful, I don't want to make it an ordeal for her.

8 THE HONORABLE JUDGE FRANK: So, why don't we, with  
9 a promise from us, so we can hear you out, whether it's an  
10 additional 104 brief offer of proof, I'll make a promise  
11 that we'll make the record clear before we say yes, no,  
12 tomorrow at the appropriate time?

13 MR. GUSTAFSON: I'm optimistic that we'll finish  
14 tomorrow. Partly, I'm optimistic because I have a  
15 commitment on Wednesday.

16 THE HONORABLE JUDGE FRANK: I have court all day  
17 Wednesday.

18 MR. GUSTAFSON: I can't continue on Wednesday. I  
19 really think we need to wrap it up tomorrow, so I hope we'll  
20 all be as efficient as we can.

21 MR. BRENNAMAN: I am almost about a half an hour  
22 left with regard to E.T..

23 MR. GUSTAFSON: Are you going to call Dr. Freeman?

24 MR. BRENNAMAN: I will, but it mostly will be to  
25 ask agreement with the other things. I don't have new

1 territory to cover with her, so I'm hoping --

2 THE HONORABLE JUDGE FRANK: It's up to you, you  
3 can leave whatever you want in here. We'll lock the doors  
4 when everybody leaves. You can leave it in here and we'll  
5 lock up the door. And they'll all be back tomorrow, so  
6 they're free to -- well, as long as --

7 THE MARSHAL: I just want to know what time you  
8 want us.

9 THE HONORABLE JUDGE FRANK: 9:00, unless counsel  
10 needs to see them.

11 MR. GUSTAFSON: 8:55 is fine. Thank you, Your  
12 Honor.

13 MR. BRENNAMAN: Thank you.

14 MR. IKEDA: Thank you.

15 (Evening recess.)

16

17 \* \* \*

18

19 I, Jeanne M. Anderson, certify that the foregoing  
20 is a correct transcript from the record of proceedings in  
21 the above-entitled matter.

22

23

24 Certified by: s/ Jeanne M. Anderson  
25 Jeanne M. Anderson, RMR-RPR  
Official Court Reporter



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